Supreme Court, U.S.
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85-809

NO.

IN THE

Supreme Court of the United States

October Term, 1985

ROSALIND M. PLUMMER, ESQUIRE,
Petitioner,

V.

GEORGE AMAN, III, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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60pp

QUESTIONS PRESENTED

I. Whether it is an abuse of discretion and prejudicial per se for a federal trial judge to implement a voir dire process which: 1) restricts the opportunity for a litigant to challenge jurors for cause; 2) precludes a litigant from challenging jurors for cause outside the hearing of the entire jury panel; 3) restricts a litigant to use of her peremptory challenges to remove jurors who are challenged for cause; and 4) impedes a litigant's opportunity for inclusion of racial minorities on an all white jury panel in a race and sex discrimination case.

II. Whether, consistent with Sections 1866(c) and 1870 of the Jury Selection and Service Act and the due process clause of the 14th Amendment to the U.S. Constitution, a federal trial judge has

an 'affirmative' duty to protect the integrity of the jury by removing a prospective juror where there is an obvious potential for improper influence through that juror.

III. Whether it is improvident, an abuse of discretion and prejudicial per se for a trial judge to select the jury foreman where: 1) the designated foreman had been legal secretary to members of the law firm representing the defendants; 2) the designated foreman had also been legal secretary to the trial judge; and several other Third Circuit judges and one of the named defendants is a former Third Circuit judge who served contemporaneously with the trial judge; 3) the trial judge, but not the petitioner, was informed by internal memo that the Chief Judge of the Eastern District of Pennsylvania, originally assigned to the case, had recused

himself due to his close personal relationship with the named defendant and former federal judge; and 4) questions had previously been raised as to the propriety of her inclusion on the panel.

IV. In determining if the trial judge's overall conduct before the jury was prejudicial with due regard to the tonality and circumstances surrounding his words and actions, whether it is improvident for a Court of Appeals to deny oral argument where the trial record is incomplete in that regard.

V. Whether it is reversible error for the district court to deny a plaintiff in a gender and race based employment discrimination case discovery of defendants' Equal Employment Opportunity Reports, submitted to the federal government in compliance with defendants' non discrimination requirements.

PARTIES

The litigants before the Court of Appeals for the Third Circuit were Rosalind M. Plummer, Esquire, a black female attorney, who was the plaintiff in the District Court and the appellant in the Court of Appeals, and the named partners and law firm partnership Morgan, Lewis & Bockius,* which were the defendants in the District Court and the appellees in the Court of Appeals.

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* George Aman, III, Clive Anderson, John Bales, III, Jackson Bonney, Denis Brennan, John Brittain, Richard Brown, Jr., Brady Bryson, Barclay Cale, Jr., Jay Clavert, Jr., Raymond Cullen, George Davies, Mark Dichter, Park Dilks, Jr., William Doran, William Goldstein, Gregory Harvey, Joseph Hennessy, Robert Hodavance, James Hunter, Jr., James Jennings, Miles Kilpatrick, Thomas Kittredge, Henry Klaiman, Robert Kleeb, Arthur Klein, Frederick Knight, 3d, Richard Koffey, Warren Laddon, Thomas Lefevre, John Lewis, Jr., George Lieberman, Arthur Littleton, George Loveless, William Macon, IV, James MacIntosh, Thomas Masterson, James Matthews, Jr., George Mayrosh, Robert McAdoo, John

McConnell, Kenneth Myers, Wesley Nagle, David O'Brien, Joseph O'Connor, Jr., Stuart Odell, Timothy O'Reilly, Benjamin Quigg, Jr., Harry Reagan,, Alan Reed, Angus Russell, John Schaeffer, Jr., Donald Scott, Howard Shecter, Lee Snyder, Peter Somers, Marc Sonnenfeld, Allen Stewart, Walter Strine, Jr., Howard Taylor, Jr., William Taylor, Joseph Torregrossa, William Wood, Robert Young, William Zeiter, Robert Zimmerman and Morgan, Lewis & Bockius.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
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The petitioner, Rosalind M. Plummer, Esquire, respectfully prays that a Writ of Certiorari issue to review the judgments and opinions of the United States

Court of Appeals for the Third Circuit entered in the two consolidated appeals in this proceeding on August 14, 1985.

OPINIONS BELOW

Two appeals were taken from Orders in the District Court. The two appeals, 85-1006 and 85-1007, were consolidated. The non-published opinion of the Third Circuit Court of Appeals on the consolidated appeals appears as Appendix A, hereto. The Court of Appeals decisions denying Petitioner's consolidated Motions for Clarification and for Rehearing En Banc appear as Appendix B, hereto. The District Court opinions in response to Petitioner's Rule 59 and Rule 52(b) post trial motions encompassed aspects of the issues raised here. (C.R./D.I.## 118 and 125, respectively).[1]

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1 (C.R./D.I.# means Court Record, Docket Entry Item #)

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on August 14, 1985. Petitioner filed three consolidated motions; 1) for clarification of the Circuit Court opinion, 2) for rehearing en banc of the three judge opinion and 3) for reconsideration en banc of the denial of Petitioner's motion for oral argument in view of the incompleteness of the trial transcript with respect to the matters at issue. No decision was rendered on the Motion for Reconsideration of the Order Denying Oral Argument on Appeal, however, the two primary Motions for Clarification and Rehearing En Banc were denied on September 3, 1985. (Appendix B).

This petition for writ of certiorari was filed within 90 days of the date of the Third Circuit Court's denial of Peti-

tioner's Motion for Rehearing En Banc. This Court's jurisdiction is invoked pursuant to 28 U.S.C., Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED[2]

1. United States Code, Title 28: The Jury Selection and Service Act, 28 U.S.C., Sections 1866(c) and 1870.

2. United States Code, Title 29: The Equal Pay Act, 29 U.S.C., 206(d).

3. United States Code, Title 42:

   The Civil Rights Act of 1866 and 1870, 42 U.S.C, Section 1981.

   The Civil Rights Act of 1861 and 1871, 42 U.S.C, Section 1985(3).

   Title VII, of the Civil Rights Act of 1964, 42 U.S.C., Sections 2000e, et seq.

STATEMENT OF THE CASE

The litigation from which this Petition for Writ of Certiorari arises began with the filing of a complaint in September, 1979, by plaintiff, Rosalind M.

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2 Appendix E contains text of statutes.

Plummer, Esquire, a black female attorney ("hereinafter, Ms. Plummer"), against certain named partners and the law firm partnership of Morgan, Lewis & Bockius, the defendants ("hereinafter, Defendants").

Ms. Plummer charged in her complaint that the defendant partners conspired to and that the defendant law firm did discriminate against her on the basis of her gender and race during her employment by Defendants and did compel her resignation and violate her civil rights as well as her rights under the employment contract.

The complaint alleged that throughout the brief history of the defendant law firm's involvement with female and black employees Defendants engaged in a course and pattern of conduct designed to curtail the mobility and tenure of black and female associate attorneys to partner-

ship positions and to force their premature resignation from the defendant law firm, particularly as they revealed partnership aspirations. Ms. Plummer further alleged that her treatment by Defendants was part of this overall pattern of discriminatory conduct.

The following federal statutes were identified by Ms. Plummer as being relevant to her claims; the Civil Rights Act of 1866 and 1870, 42 U.S.C., Section 1981; the Civil Rights Act of 1861 and 1871, 42 U.S.C., section 1985; Title VII of the Civil Rights Act of 1964, 42 U.S.C., Sections 2000(e), et seq. and the Equal Pay Act, 29 U.S.C., Section 206(d).

On October 2, 1980, this case was reassigned from the calendar of the Chief Judge of the Eastern District of Pennsylvania, the Honorable Joseph S. Lord, III, to the calendar of the current

trial judge, the Honorable Donald W. VanArtsdalen, without comment or explanation to the parties.

However, four years later, in the trial judge's post trial Memorandum Opinion of October 19, 1984, denying Ms. Plummer's Rule 59 new trial motion, Ms. Plummer was alerted for the first time that the October 1980 reassignment had not been a routine matter. In the revealing words of the trial judge;

> One final note needs to be addressed regarding this [Ms. Plummer's] contention [of partiality]. When this case was filed; it was originally assigned, under our random assignment system, to the then Chief Judge Joseph S. Lord. Judge Lord sent a memorandum, dated September 30, 1980, to the Clerk of Court, stating that he had recused himself because of his 'close personal relationship with Judge Masterson' who was a named defendant. ... The case was thereupon reassigned to me. Copies of the reassignment order were mailed to counsel although a copy of Judge Lord's memorandum was not. It is clear, however, that this court was aware of the potential problem

> involving Mr. Masterson. I accepted assignment of this case because, although I was a colleague, our prior professional relationship in no way affected my ability to sit as a judge in this matter.
>
> (Emphasis in original). (CR/DI #118, at page 17 of the Opinion.)

During discovery Ms. Plummer and her former counsel had sought, beginning in 1980, to obtain discovery of information calculated to disclose or lead to evidence of Defendants' past practice with respect to black and female employees. In that regard Ms. Plummer and her former attorney requested copies of Defendants' Equal Employment Opportunity Reports ("EEO-1 Reports").

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3 The parties received only a routine, non-explanatory reassignment order. Had Ms. Plummer received the internal memorandum, she could have proceeded with greater regard to the potential for prejudice in the courts of the Eastern District of Pennsylvania.

These EEO-1 Reports are 'verified and certified' documents prepared by Defendants in the normal course of conducting business and submitted to the federal government as part of Defendants' federal contract requirements.[4] The reports are prepared currently for each contract year and contain reliable information about the gender and racial turnover and composition of Defendants' employee pool.

The information contained in the EEO-1 Reports is directly relevant, as well as calculated to lead to other admissible 'pattern and practice' evidence. At the very least these reports could be used at trial to attack

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4 Since these EEO-1 Reports are routinely and currently prepared and certified by Defendants, the information is more reliable than notes prepared by and screened by Defendants' attorneys solely for use in this adversarial proceeding. It is also public information.

Defendants' credibility and honesty in connection with inconsistencioes in testimony and other discovery.

The District Court, nevertheless, prohibited Ms. Plummer's access to these reports and precluded disclosure of the names of the government agency in question to prevent Ms. Plummer from obtaining the EEO-1 Reports through the Freedom of Information Act. (CR/DI #61)

Moreover, the trial judge sustained Defendants' objections to use of the discovery information which was provided by Defendants on the premise that the information was too confusing and misleading to be reliable.

The District Court also took the position that Ms. Plummer could only pursue a disparate treatment theory and further confined her discovery to the period of her interaction with the

Defendants, from her summer interviews in 1976 through her departure in 1979.[5]

This case went to trial in August 1984, after the jury was enpaneled. Throughout the two weeks of trial testimony and during his charges to the jury, the trial judge made one-sided and disparaging comments on the evidence offered and extracted by Ms. Plummer which tended to eliminate or reduce its probative value. These comments were, without exception, to the exclusive prejudice of Ms. Plummer.

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5 For practical purposes this precluded Ms. Plummer from obtaining reliable evidence of how other black and female attorneys were supervised, evaluated, rated and paid over the term of their employment. Only approximately ten black attorneys had been employed during the 100 year old history of the firm and only since 1968.

The trial judge's substantive jury instructions were particularly interlaced with one sided commentary as to the judge's recollection of the evidence which had and had not been offered during the two weeks of trial testimony. For example, the jury was told in connection with the Equal Pay claim to consider that Ms. Plummer had offered no evidence of a difference in pay given females as opposed to males. However, evidence had been extracted during cross examination of one of the Defendants that another female, whose work was highly praised by Defendants during trial, had received the same low salary increase as had Ms. Plummer, while the males had uniformly received a higher increase.

Ms. Plummer made timely objections to such commentary and further objected that the judge's instructions in total sub-

stance and tonality would tend to mislead the jury as to the import of the evidence and impose a more stringent definition for "preponderance of evidence" than was proper. However, the judge's commentary had already had its effect.

In this setting of judicial partiality, voir dire was conducted, a jury was enpaneled, a jury foreman was selected and jury deliberations ensued. It is this following area, concerning the trial judge's direct involvement with and influence over the jury, that lies at the heart of this Petition for Writ of Certiorari.

In August of 1984, voir dire was conducted to select an eight person jury. Ms. Plummer's pretrial request for individual sequestration of prospective jurors during voir dire was denied by the trial judge.

A panel of 24 prospective jurors drawn from the July 30th Petit Panel were escorted into the courtroom on August 1, 1984, for voir dire. The litigants were then provided with a copy of the entire Petit Panel listing containing information on 183 prospective jurors. Of this voluminous listing, employment information was omitted for at least 36 prospective jurors.

In an acknowledged deviation from his customary practice, the trial judge was present throughout the voir dire and challenges to jurors were conducted in open court;

> It is my usual practice in civil cases to permit counsel, by agreement, to question the prospective jurors in my absence. If the attorneys cannot agree as to excusing some prospective juror or an attorney wishes to challenge for cause, the attorneys take the matter up with me in chambers 'on the record'. Because of contentious pretrial proceedings in this case, and to satisfy myself that the examination would be conducted

> fairly, I decided to have the entire voir dire carried out in open court, with myself and the court reporter present.
>
> (Page 7 of District Court Memorandum Opinion denying Ms. Plummer's motion for new trial. CR/DI # 118).

The trial judge justified this deviation by insisting that he wanted to ensure that voir dire was conducted fairly.[6] However, the only practical effect of the deviation was to preclude Ms. Plummer from discussing and challenging problematic jurors for cause outside of the hearing of the entire panel.

The 24 prospective jurors were for the most part questioned as a group, with the trial judge present to hear the responses throughout the voir dire.

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6 If the judge's concern was to protect Ms. Plummer, who was an inexperienced attorney proceeding pro se, from being manipulated by three experienced defense attorneys from established corporate law firms, the record is remarkably deficient in reflecting any such protective efforts.

The first twelve jurors, seated on the front row, were white. Based upon the responses of these twelve to voir dire questions, one unemployed juror felt he had lost his job as a result of an affirmative action program benefiting blacks, one objected to having a female supervisor or boss, at least one felt there were trades or professions in which women would not perform as well as men and another divorced panelist demonstrated an overall animosity towards women in questions concerning working women.

Then there was Ms. Anna Rogers, for whom no employment information had been provided in the Petit Panel listing. By the close of the voir dire it was revealed that Ms. Rogers had been legal secretary to a number of judges, including the trial judge.

It was also disclosed that she had been legal secretary to at least one member of the defense law firm.

Later, during trial, it was disclosed that one of the named Defendants was a former Eastern District judge and a colleague and contemporary of the trial judge.

In a post trial memorandum opinion, the trial judge further disclosed that the Chief Judge of the Eastern District of Pennsylvania had previously recused himself from this case because of his close personal relationship with the named defendant and material witness, the former judge. These latter facts were known to the trial judge during voir dire although they were not known at the time by Ms. Plummer.

With regard to Ms. Rogers, during voir the trial judge continually

maneuvered Ms. Plummer into the posture of having to publicly discuss her concerns, impressions and challenges to the propriety of Ms. Rogers' inclusion on the panel.

At the same time the trial judge made it audibly clear that he saw no reason for Ms. Rogers to be removed for cause and stated that he thought she was intelligent and would be fair. ("Let me say this: It is my impression that she is very intelligent and would be very fair." TR, at 43).

In an effort to avoid public confrontations, which could only prejudice the presentation of her pro se case, Ms. Plummer retorted that only that she thought Ms Rogers would probably be as "subjective" as the rest of the panel.

Then, at the first opportunity to do so outside of the hearing of the panel, Ms. Plummer asserted her challenges to three jurors for cause, including Ms. Rogers.

However, Ms. Plummer's efforts at confidentiality at side bar were frustrated when the trial judge gasped with amazement, stared at her in silence, audibly echoed her challenge to the jury panel, changed the subject and, while turning to face the panel, stated loudly and firmly that there was no basis for removal of any juror for cause.

The court reporter then returned to his seat, the judge terminated the side bar conference and turned fully to face

the panel without any further entertainment of Ms. Plummer's challenges:

(At side bar:)

THE COURT: Now, the way this would ordinarily work would be that we would strike off all of those beyond the first 14. That is the only way it could be done, I think.

MS. PLUMMER: I have three challenges.

THE COURT: You mean three challenges for cause?

MS. PLUMMER: Yes.

THE COURT: Oh.

MR. BECHTLE: Your Honor, bear with me. ...

THE COURT: In other words, ordinarily it would be the same as if we had just called up 14, which is all we would need if there were none for cause.

All right. You say you have some you want to challenge for cause? It would seem to me from the answers given there is probably no basis for cause for any.

MS. PLUMMER: Well, I don't want to take my chances with them and just use the peremptory challenges.

THE COURT: Then just leave the first 14 and make 3 peremptories from the first 14.

MS. PLUMMER: Is there any other procedure by which we can do this, Your Honor?

THE COURT: I don't know of any other proper procedure to do it.
(TR, from page 39, line 14, through page 40, line 11.)

In his Memorandum Opinion denying Ms. Plummer's motion for new trial, the judge attempts to explain what he refers to as the unresolved "ambiguity" on the matter of Ms. Plummer's challenges for cause;

Immediately following Mr. Bechtle's voir dire, plaintiff stated that she had three challenges for cause. I informed plaintiff that from the answers given, it seemed to me that there probably was no basis to strike anyone for cause. Plaintiff's reply that 'I don't want to take my chances with them and just use the peremptory challenges' is ambiguous. It could mean plaintiff either would just strike the three by using her peremptories or that she did not want to waste her peremptories to strike them. Whatever plaintiff meant does not matter.
(CR/DI #118, page 12, footnote 3.)

The only option the judge left available to Ms. Plummer for removal of Ms. Rogers was to relinquish one of her peremptory challenges by stipulating with defense attorney for her removal.[7] However, given the number of problematic jurors, relinquishment of her peremptory challenges was not an attractive option and she expressed that to the court.

The panelists seated as jurors ##15 through 24 were then dismissed and the litigants each used three peremptory challenges. In that process the Defendants used two of their peremptory challenges to remove the two black prospective jurors seated as jurors ##13 and 14.

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7 Such as it was, this option became available because even one of the defense attorneys felt constrained to acknowledge that it was unfair to include Ms. Rogers on the panel because of her relationship with a member of his firm.

No jurors were removed for cause by the trial judge and Ms. Rogers was seated by the judge's deputy as juror #1 of an all white, eight person jury.

Later, in his charges to the jury, the trial judge informed a group of seven layperson jurors and one legal secretary, Ms. Rogers (juror #1), that it was proper and customary practice to select juror #1 as the foreperson.

The trial judge's clerk and deputy then provided all copies of the blank interrogatory forms to Ms. Rogers. Moreover, prior to the selection of a foreman by the jury members, the trial judge addressed all questions intended for the jury as an entity to Ms. Anna Rogers.

Although the jury foreman had not been selected at the time, the trial judge continued to direct his comments and questions specifically to Ms. Anna

Rogers, as opposed to the entire panel, when jury deliberations were interrupted for an overnight recess on the evening of August 15, 1984.

When the jury's answers to the Special Interrogatories were finally returned at 11:17 A.M. on August 16, 1984, Ms. Anna Rogers identified herself as the jury foreman and as such she was the only person addressed by the court to respond to the interrogatory questions propounded to the jury.

In response to the crucial question, whether all members of the jury intended and understood by their interrogatory answers to find in Defendants' favor on all claims, the only responsive juror was Ms. Anna Rogers.

When Ms. Plummer requested a polling of the remaining jurors, the trial judge confined the inquiry to a recitation by

each of the jurors of the interrogatory answers without reading of the questions to which the answers were to be responsive. The judge's deputy conducted the limited polling and no polling was permitted as to general liability.[8]

At the conclusion of the trial the jury answered "NO" to each question of liability except 'whether they believed by a preponderance of the evidence that Ms. Plummer was constructively discharged', to which they responded "YES". However, the jury did not attribute that constructive discharge to either gender or race on the basis of the evidence which they could consider.

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8 The trial judge had previously denied Ms. Plummer's request for submission to the jury of a question concerning general liability and for submission of her pendent claim for breach of her employment contract.

Thereafter, on August 16, 1984, the trial judge filed a judgment in favor of Defendants on all claims, except the breach of contract claim for which he declined to make a ruling on the premise that pendent jurisdiction had not be specifically asserted in the complaint.[9]

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9 However, testimony and written evidence had been received during trial on this pendent claim, including the expressed terms and reasonable expectations Ms. Plummer was given about her employment in such areas as supervision, evaluations, salary, mobility and minimum tenure.

In particular, testimony had been received from the Defendants acknowledging that new employees were accorded a four to five year probationary period because of the learning process necessary for familiarization with procedures of the law firm and of the local courts.

However, in contrast, cross examination testimony and written evidence was also extracted from the Defendants to the effect that the two black females employed by the firm during Ms. Plummer's tenure were afforded only 6 month probationary periods and "warnings" within less than one year of employment.

On appeal to the Third Circuit Court of Appeals, Ms. Plummer challenged the overall partiality of the trial judge, with emphasis on his direct involvement and influence over the jury. Ms. Plummer also specifically raised the issue of the trial judge's manipulation of voir dire, frustration of the litigant's opportunity to challenge jurors for cause and the improvidence of his designation of the jury foreman under the circumstances.

Also, in her appeal Ms. Plummer informed the Court of Appeals, with specific descriptions, that the circumstances, tonality and physical actions accompanying the trial judge's recorded words were not reflected in the trial

record and that the transcript was otherwise incomplete.[10]

Ms. Plummer noted that one factor contributing to omissions in the trial record was the continuous and frequent changes in the court reporters several times during each hour throughout the two week trial, in order to accommodate Defendants' request for daily copy.

However, a request by Ms. Plummer for oral argument on appeal was denied. Thereafter, in a Memorandum Opinion, designated "Not to be Published", three Circuit Judges sanctioned the District Court's conduct.

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10 Nevertheless, Ms. Plummer's five volume Appendix did contain numerous instances of one sided commentary during trial and jury charges, inconsistencies between Defendants' testimony and the trial judge's findings of fact and unusual voir dire proceedings.

After recounting in detail and approving the trial judge's characterization of the facts,[11] the Circuit Court defended the trial judge's role in selection of Ms. Rogers as jury foreman.

Notwithstanding the trial judge's own acknowledgment of at least an "ambiguity" in the handling of Ms. Plummer's challenges for cause and an

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11 Although raised in the appeal to the Circuit Court, the question of inconsistencies between the trial record and the judge's findings of fact is not at issue in this Petition.

However, to balance the emphasis on the judge's characterization of the facts in the Circuit Court opinion, it should be noted that had the trial evidence demonstrated that Ms. Plummer's employment experience with the Defendants was the pleasant and sensitive experience described by the trial judge, the all white jury could not, as it did, have returned a "YES" to the question whether the preponderance of the evidence demonstrated that Ms. Plummer was constructively discharged.

abrupt abortion of those challenges on the record, the Circuit Court did not direct address the issue of judicial manipulation of voir dire.

Also, in response to Ms. Plummer's challenge of overall partiality and prejudice by the trial judge, the Circuit Court stated simply that the record did not support that contention, without addressing the instances of partiality raised by the appeal.

REASONS FOR GRANTING THE WRIT

I. The Federal Court of Appeals for the Third Circuit Has Rendered A Decision Which So Far Sanctioned A Departure By the District Court From the Accepted and Usual Course of Judicial Proceedings, and Has Itself So Departed From the Accepted and Usual Course of Judicial Proceedings, As to Require and Demand the Exercise of this Court's Power of Supervision.

There can be no finality in a decision and an orderly society can not be maintained if the courtroom is robbed of its impartiality and neutrality with respect to the litigants. The district court, therefore, has a duty to ensure that a judgment is not influenced by partiality or prejudice from either the jury or the trial judge. Barrett v. Robinson, 65 F.R.D. 652 (E.D.Pa. 1975).

It is clearly not an easy matter to separate our conduct from our conscious and subconscious feelings and loyalties. Justifications are always available for our unfavorable treatment of individuals

who confront or threaten our way of life, our personal and professional colleagues or respected and influential members of our community.

However, members of the judiciary - the framers, arbitrators, determiners and enforcers of the law - have a higher calling; they have an 'affirmative' duty to protect the integrity of the judicial process by eliminating the potential for partiality and prejudice from themselves and from the jury.

In the wise words of this Court in Swain v. Alabama, 380 U.S. 202, at 219 (citing Lewis v. United States, 146 U.S. 370, at 376 and In re Murchison, 349 U.S. 133, at 136); " . . .to perform its high function in the best way 'justice must satisfy the appearance of justice'."

Petitioner has the unfortunate task of requesting that this Court examine a case where the Court of Appeals sanctioned the district court's violation of a litigant's most essential rights; the right to a fair trial before an impartial jury.

From the inception of discovery through the rendering of a judgment, the experienced trial judge in this case engaged in conduct designed first, to restrict and manipulate the plaintiff from having a case to present to the jury, and second, to manipulate plaintiff and the jurors so as to restrict challenges and exercise improper influence and control over the jury deliberation process.

The trial judge also left the jury open to influence from the defense attor-

neys, with full knowledge that there was a clear and obvious potential for such abuse.

A pro se litigant and an inexperienced attorney should neither expect nor demand any special consideration from the court. Neither, on the otherhand, should they have to 'out maneuver' the trial judge, in addition to opposing counsel, in order to simply protect essential and basic rights to which all parties are entitled; 1) the right to challenge jurors for cause and with some degree of confidentiality, 2) the right to exercise three unhindered peremptory challenges, 3) the right to an impartial jury and 4) the right to a jury unbiased by one sided, disparaging and prejudicial commentary from the bench.

However, it is the violation and frustration of these essential rights which lies at the heart of this Petition.

While the trial judge is not merely a moderator, ". . .he should always be a 'neutral' empire." Jackson v. United States, 329 F.2d 893, 894 (D.C. Ct. of App. 1964). In jury cases a particular demand is placed on the trial judge to exercise great restraint and caution because of the obvious danger that his intervention will have prejudicial consequences. Jackson, supra.

This Court reiterated that principle, in United States v. United States Gypsum Co.[12] and Rogers v. United States,[13] and determined that on review the trial judge is held to a higher standard of conduct

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12 438 U.S. 422, 98 S.Ct. 2864 (1978).

13 422 U.S. 35, 95 S. Ct. 2091 (1975).

and compelled to give more careful consideration in acting on matters which may affect the impartiality of a juror.

In Rogers v. United States, supra., this Court further acknowledged that both the verbal and non verbal communications of the trial judge could act to have a coercive effect on a jury.

In Jackson, supra, the Court of Appeals for the District of Columbia took the position that the appellate court is required to review the cumulative impact of the trial judge's overall activities, and not merely review single acts or comments without consideration of the overall circumstances or non-verbal conduct giving definition and import to those single acts.

It is obviously misleading to the jury for a trial judge to single out only evidentiary features favorable to the

Defendants after two weeks of trial testimony, as was done in this case.

Under comparable circumstances, where the trial judge made commentary which was partial and one sided, the Third Circuit Court of Appeals determined that such commentary constituted reversible error. Kornicki v. Colmar Steamship Corporation, 460 F.2d 1134, 1137-1139 (3d Cir. 1972). See also Systems, Inc. v. Bridge Electronics Co., 335 F.2d 465, 467 (3d Cir. 1964); Cromling v. Pittsburgh & L. E. R. Co., 327 F.2d 142, 152 (3d Cir. 1963); Sleek v. J. C. Penny Co., 324 F.2d 467, 478-479 (3d Cir. 1963).

The Fifth and Eighth Circuit Courts of Appeals applied the same principle in Burleson v. Champion, 283 F.2d 653, 655 (5th Cir. 1960) and Chicago & North Western Ry. v. Rieger, 326 F.2d 329, 336 (8th Cir.), cert. denied, 377 U.S. 917,

84 S.Ct. 1182 (1964); Halladay v. Verschoor, 381 F.2d 100, 113 (8th Cir. 1967), respectively.

Indeed, the facts in this case should have been even more compelling to the Third Circuit Court because the trial judge did not confine his partial conduct to comments on the testimony; he also directly interfered with with the natural function of the jury and its collective mind under circumstances where the potential for partiality and improper influence was clear and apparent.

Even assuming, arguendo, that it was completely appropriate for the trial judge not to remove Ms. Rogers from the jury, either for cause or sua sponte under Sections 1866(c)(2) and (c)(5) of the Jury Selection and Service Act,[14] he overstepped the reasonable boundaries of discretion and propriety when he

compounded an obvious problem by lobbying to secure the selection of Ms. Rogers as jury foreperson.

While under ordinary circumstances a jury foreman might serve purely an administrative function, there can be no question that a layperson juror in this case would interpret from the extraordinary attention and respect accorded Ms. Rogers by the trial judge that she as legal secretary had a superior attribute or ability in that posture.

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14 28 U.S.C., Sections 1866(c) . . .any person summoned for jury service may be . . .(2)excluded by the court on the ground that such person may be unable to render impartial jury service as a juror or would be likely to disrupt the proceedings, or . . .(5)excluded upon determination by the court that his service as a juror would be likely to threaten the secrecy of the proceedings, or otherwise adversely affect the integrity of jury deliberations.

The Circuit Court, however, disregarded the non verbal pressures placed on the jurors and reasoned that the judge uttered one sentence of self protective language and therefore did not force the jury to select Ms. Rogers.

The Circuit Court gave no cumulative import whatsoever to the earlier disclosures made about Ms. Rogers during voir dire or to the fact that the trial judge had superior knowledge of facts which clearly tested the propriety of enpaneling her.

In addition, it is unlikely that an all white layperson jury in a gender and race discrimination case would question the wisdom of the trial judge in such matters as the selection of the jury foreperson.

The Third Circuit also did not address the trial judge's contrivances

and intimidations during voir dire to preclude Ms. Plummer from clearly establishing her three challenges for cause. On this issue the Third Circuit's reasoning is not clear except that they may have been reasoned that Ms. Plummer should have relinquished one of her peremptory challenges to remove Ms. Rogers.

However, this Court and several other circuit courts of appeals have held that it is reversible error to force a party to relinquish a peremptory challenge in order to remove a juror who is properly removable for cause, even in the absence of actual prejudice. Swain v. Alabama, 380 U.S. 202, at 219, 85 S.Ct. -, at 835 (1964). See also 28 U.S.C., Sections 1866(c)(2),(4) and (5) and Section 1870.

Several circuit courts, including the Third Circuit, have rendered decisions to similar effect, Carr v. Watts, 597 F.2d 830, 833 (2d Cir. 1979)(the indirect error of improperly denying a challenge for cause that compels the unnecessary use of a peremptory challenge can also be reversible error); Blount v. Plovidba, 567 F.2d 583, 585 (3d Cir. 1977); United States v. Rucker, 557 F.2d 1046 (4th Cir. 1977); Chestnut v. Ford Motor Company, 445 F.2d 967, 972 (4th Cir. 1971); United States v. Nell, 526 F.2d 1223, 1227-1230 (5th Cir. 1976); Hathorn v. Trine, 592 F.2d 463 (8th Cir. 1979).

Even assuming there was no isolated action by the trial judge which, standing alone, is sufficiently prejudicial to constitute a reversible error or abuse of discretion, the cumulative and clear

impact of the trial judge's overall conduct in this case compels at least an informed consideration of the matter by the Third Circuit through oral argument. See Jackson, supra.

II. The Questions Raised in this Petition Involve Issues of Exceptional Importance:

A. The Extent of A Federal Trial Judge's Affirmative Obligatiion to Protect the Integrity of the Jury from the Potential for Improper Influences.

The Federal Jury Selection and Service Act is somewhat limited in the guarantees which it specifically defines. However, the absence of express guarantees in the language of the Act does not mean that a trial judge should be able to engage in a course of conduct designed to frustrate the overall objectives of the Act; to ensure a fair and impartial jury. See United States v. Robinson, 421 F. Supp. 467 (D.Conn.

1976)(where the prosecutor used his peremptory challenges solely to exclude blacks from service).

This right to an impartial jury is equally applicable to the civil litigant. Carr v. Watts, supra. In addition, the trial judge has an affirmative obligation to apply prudence to remove jurors who no reasonable person could maintain would not be affected in their freedom of judgment. See 28 U.S.C., Sections 1866(c)(2), (c)(4) and (c)(5).

In this case the trial judge, himself, manifested a partiality and bias to Ms. Plummer's detriment. The reasons for such partiality became clearer during the course of the trial when it was disclosed that the trial judge was a professional colleague and contemporary of one of the named defendants, a former Third Circuit judge. Moreover, it was further

disclosed later, in post trial memorandum opinions, that the Chief Judge of the same Eastern District of Pennsylvania had previously recused himself from the case because of his relationship to the same named defendant.

The fact that the trial judge previously maintained an authoritative and supervisory role with respect to the recommended jury foreperson, Ms. Anna Rogers, is not as compelling as the fact that this same juror held a similar posture to a member of the defense law firm and several other judges in an action where a named defendant was a former federal judge.

The evidence of the clear taint of partiality in this case evolved over the

course of the trial through the gradual disclosure of conduct and facts known to the trial judge from the inception of the case.

The trial judge had an affirmative duty to remove that taint since neither the suspect juror, Ms. Anna Rogers, nor anyone else could reasonably say that she, as well as the jurors upon whom she impacted as their foreperson, was not affected in her freedom of action as a juror. See Remmer v. United States, 350 U.S. 377, 76 S. Ct. 425(1956).

Moreover, since the jurors were at no point sequestered, the potential for direct external influence on Ms. Rogers was clear and apparent during the overnight recess.

The trial judge and, apparently, the Third Circuit Court of Appeals takes the position that it was fully within the

trial judge's discretion both to permit Ms. Rogers to remain on the panel and to recommend her for service as jury foreperson.

Petitioner disagrees with the Third Circuit, the trial judge surely abused his judicial discretion in these matters. Indeed, the Petitioner goes a step further and submits that, in not remcving Ms. Rogers as juror under the circumstances of this case, the trial judge actually violated his affirmative duty to protect the integrity of the entire jury from the clear potential for abuse and improper influence.

Clearly, under the Federal Jury Selection and Service Act, the trial judge is the only person empowered to take such affirmative measures to ensure fairness.

He cannot transfer that responsibility to the litigants or avoid his responsibility by contriving public debates and restricting the for cause challenges. The fact that a more experienced plaintiff might not have been intimidated by the trial judge's contrivances is inconsequential.

B. The Providence of Restricting the Practice by Several Courts of Appeals, Permitting the Trial Judge to Select the Jury Foreman, in Order to Protect A Litigant's Right to an Impartial Jury.

Petitioner further submits that this Court should address the question whether limitations, at least of fairness and abuse of discretion, should be imposed on the current practice in the several Circuit Courts of Appeals of permitting the trial judge absolute authority to select jury foremen. As the circumstances of this case demonstrate, such a practice, unrestricted, can be

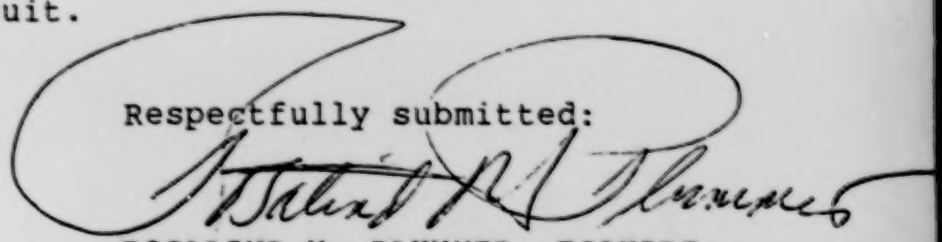
used as one of several cumulative vehicles for the exercise of improper and excessive control over jurors.

In addition, even in a neutral context, the selection of the jury foreman is, in a real sense, part of the adversarial process. It should be shaped by the natural interest of jurors and should draw motivation more from the evidence and the compelling arguments of counsel than from the convenience of the court.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgments and opinions of the United states Court of Appeals for the Third Circuit.

Respectfully submitted:



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85-809

Supreme Court, U.S.
FILED
OCT 29 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

ROSALIND M. PLUMMER, ESQUIRE,
Petitioner,

V.

GEORGE AMAN, III, ET AL.,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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APPENDIX A

Not To Be Published Memorandum Opinion of Third Circuit Court of Appeals Affirming the Judgments of the District Court (8/14/85)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 85-1006 and 85-1007

PLUMMER, ROSALIND M. ESQUIRE,

Appellant

vs.

GEORGE AMAN, III, ET AL.,

Appellees

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF PENNSYLVANIA

(D.C. Civ. No. 80-3676)

District Judge: Honorable Donald W.
VanArtsdalen

Submitted Pursuant to
Third Circuit Rule 12(6)
August 9, 1985

BEFORE: ALDISERT, Chief Judge, and
STAPLETON and MANSMANN, Circuit Judges

(Opinion Filed: August 14, 1985)

MEMORANDUM OPINION OF THE COURT

STAPLETON, Circuit Judge

This is an appeal of an action brought by Rosalind Plummer ("Appellant"), a black female, against certain present and former partners of the law firm of Morgan, Lewis & Bockius ("Morgan"). Appellant alleged, in her complaint, that Morgan discriminated against her during her employment by Morgan as an associate attorney on the basis of both race and sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e) et seq., the Civil Rights Act of 1866 and 1870, 42 U.S.C. §1981, the Civil Rights Act of 1861 and 1871, 42 U.S.C. §1985, and the Equal Pay Act, 29 U.S.C. §206(d). In addition, Appellant asserts that she raised a claim based on breach of

contractual rights. The district court, following a jury trial, entered a judgment in favor of Morgan on all counts. For the reasons set forth hereafter, we affirm.

I.

The following background facts were found by the trial judge in connection with the non-jury issues in the case. Appellant is a graduate of Swarthmore College and Harvard Law School. During the summer of 1977 while she was between her second and third years of law school, Appellant was employed by Morgan as a summer associate. Thereafter, Appellant was offered full-time employment as an associate attorney with Morgan to commence in August, 1978, following her graduation from law school. She accepted this offer after being assured that her performance would

be evaluated strictly on the basis of merit and without regard to her race or sex.

In July, 1978, Appellant took the Pennsylvania Bar examination but failed to pass. She was informed of this in October, 1978, after she had started to work at Morgan. Several of the partners at Morgan discussed the matter with her and she was assured that she could take as much time off from work as she needed in order to prepare for the next examination scheduled for February, 1979. In order to permit her to do this, however, Appellant was not given any long-term assignments prior to retaking the bar examination.

In accordance with Morgan's formal evaluation process, all associate attorneys are evaluated semi-annually. Morgan's annual salary increases for

associate attorneys are set by the Professional Evaluation Committee as part of the June semi-annual review. Appellant's evaluation for the period from September through December, 1978 was based primarily on her work for Arthur Littleton. Mr. Littleton gave Appellant an overall rating of "2", indicating that, in his opinion, her work needed substantial improvement.[1]

---

1. Under the evaluation system used by Morgan at that time, associate attorneys were rated in five categories: (1) legal ability, (2) industry, (3) professional judgment, (4) cooperativeness, and (5) attraction of new clients or development of existing clients. In addition, the associate was given an overall rating. A numerical scale from "1" to "5" was used with "1" being the lowest rating and "5" being the highest rating. A rating of "3" was considered the norm for first-year associates to be considered "on track" for eventual partnership consideration.

Appellant's second evaluation, covering the period from January through May, 1978, although based on the comments and ratings of five different partners, similarly yielded low overall ratings (three partners gave her an overall rating of "2", one partner gave her an overall rating of "2+", and one partner gave her an overall rating of "3"). However, while the evaluation process indicated that several partners felt that Appellant's work product needed improvement, not all the comments received were negative. On the basis of Appellant's evaluation, Appellant received a $3,000 increase in salary effective July, 1979. The other eight associates who had started in the fall of 1978 each received a raise of $4,500.

In April, 1979, Appellant attended a corporate practice seminar at Harvard University, and in June, 1979, she attended a copyright seminar at New York University, both at the expense of Morgan. However, Appellant's request that she be reimbursed for attending the National Bar Association convention in Los Angeles, California, in the summer of 1979 was denied for a number of reasons including the fact that she had attended two seminars and that she had already missed five weeks of work due to illness, vacation, and studying for the bar examination.

In September, 1979, Appellant met with Morgan's managing partner, Howard Shecter, and told him that her working conditions were intolerable. Mr. Shecter tried to dissuade her from leaving the firm, but on September 11,

1979, Appellant tendered her resignation effective September 14, 1979.

On September 22, 1980, Appellant filed her complaint in federal court. Following almost four years of protracted discovery proceedings, on August 1, 1984, the case when to trial before a jury with Appellant representing herself. The jury returned answers to special interrogatories exonerating Morgan on all charges of sex and race discrimination. However, the jury did find that Appellant had been constructively discharged. Thereafter, the district court ruled in favor of Morgan on all claims not submitted to the jury. The district court also denied Appellant's motion for a new trial and her motion to amend the court's findings of fact and conclusions of law. This appeal followed.

II.

In this appeal, Appellant raises a plethora of challenges to the judgment entered in favor of Morgan. Appellant claims that the trial judge abused his discretion by denying her motion for a new trial pursuant to Fed.R.Civ.P. 59 and her motion to amend findings of fact and conclusions of law pursuant to Fed.R.Civ.P. 52(b). In addition, Appellant asserts that the trial judge erred by failing to grant Appellant an evidentiary hearing on her motion for a new trial, by restricting Appellant's access to certain information during discovery, by excluding certain evidence at trial, by failing to submit to the jury both Appellant's breach of contract claim and an interrogatory as to the question of general liability, and by dismissing Appellant's contract claim.

The common denominator underlying these issues is that, according to Appellant, she did not receive a fair trial due to the bias and prejudice against her of both the trial judge and members of the jury.

In response, Morgan argues, inter alia, that Appellant did, in fact, receive a fair trial, that many of the alleged problems with the trial proceedings resulted from Appellant's own actions, and that the district court properly confined discovery to material relating to Appellant's claims. Morgan relies heavily on the trial judge's lengthy memorandum opinion setting forth his reasons for denying Appellant's motion for a new trial. Plummer v. Aman, C.A. No. 80-3676 (E.D. Pa. Oct. 19, 1984) (App. 54-74).

A.

Appellant asserts that the trial judge improperly denied her motion for a new trial.[2] Appellant's motion set forth allegations, inter alia, that the trial judge acted in concert with defense counsel to deny Appellant a fair trial, that the trial judge improperly influenced the jury through his control over the jury foreperson, Anna Rogers, that the trial judge concealed the extent of his prior association with Ms. Rogers, and that the trial judge acted in biased manner throughout the trial. As part of the relief requested,

---

2. Although the document in question was entitled "Plaintiff's Motion for Mistrial and to Show Cause Why Said Motion Should Not Be Granted," the district court treated it as a motion for a new trial pursuant to Fed.R.Civ.P. 59. For purposes of this appeal, we do likewise.

Appellant sought to have Ms. Rogers take a lie detector test concerning the factors that influenced her decision in favor of Morgan.

We have reviewed the record and are convinced that there is no merit in any of the claims raised in Appellant's motion for a new trial. The trial judge clearly indicated to counsel at side bar during voir dire that he though Ms. Rogers may have worked for him as a secretary at some time prior to his becoming a judge. App. 520. After further questioning by defense counsel, Ms. Rogers indicated that she had in fact worked for the trial judge as well as a former partner of the law firm representing Morgan. App. 521-22. At this point, defense counsel stated on the record that he thought "maybe fairness would dictate that Mrs. Rogers

be excused." App. 522-23. The trial judge indicated that he would do as the parties wished. Appellant responded that she had "the impression that Mrs. Rogers [would] probably be as subjective as anyone else." App. 523. Thereafter, at side bar, the trial judge again brought up the issue of empaneling Ms. Rogers on the jury, indicating that he thought she may have been a secretary for Judge Biester who at one time was a partner in defense counsel's law firm. App. 533. The trial judge added, however, that it was his impression that she was very intelligent and would be very fair. App. 534. Appellant stated in response, "I believe so." App. 534. Having thus expressly approved Ms. Rogers as a juror, Appellant cannot now complain about her presence on the jury.

As to Appellant's contention that the trial judge virtually dictated that Ms. Rogers, as juror number one, would be chosen the jury foreperson through his comments speak for themselves. During the charge to the jury, the trial judge stated:

> The manner in which you proceed during your deliberations is a matter which is largely up to you. One of you should be appointed as the forelady or the foreman of the jury. . . . Ordinarily, it is the number one juror who acts as the foreperson, but if among yourselves it is decided someone else should act in that capacity, that would be perfectly appropriate and satisfactory.

App. 913 (emphasis added).

The trial judge simply informed the jury of the customary practice. He clearly did not force the jury to follow such a practice, and indeed, specifically

emphasized that the jury could choose anyone they wanted as foreperson.

With respect to Appellant's claim that the trial judge otherwise exhibited a bias against Appellant throughout the trial, we are satisfied after a review of the record that the trial judge conducted a fair and impartial trial. The portions of the record cited by Appellant simply do not support her claim of bias.[3]

B.

Appellant contends that the trial judge abused his discretion in not amending his findings of fact and conclusions of law pursuant to

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3. Likewise, we find no merit in Appellant's contention that the trial judge should have granted an evidentiary hearing on Appellant's motion for a new trial.

Appellant's Rule 52(b) motion. The essence of Appellant's argument is that the trial judge should have ruled in Appellant's favor with respect to her alleged breach of contract claim. This argument is similarly reflected in several of the other issues she has raised on appeal.

The trial judge, in denying Appellant's Rule 52(b) motion, ruled, inter alia, that Appellant's complaint failed to set forth any independent claim for relief on the basis of breach of contract. After reviewing Appellant's complaint, we are convinced that the trial judge's position is correct. While the complaint does allege that Morgan violated Appellant's contractual rights, it is clear that the contractual rights so referenced are

limited to the right not to be discriminated against on the basis of either race or sex. Moreover, there is no allegation in the complaint of a jurisdictional basis for entertaining an independent contract claim. This supports the trial judge's determination that no such claim was ever raised in the complaint.

We find no error in the trial judge's failure to submit to the jury Appellant's alleged contract claim or in his denial of Appellant's Rule 52(b) motion.

C.

With respect to the remaining issues raised by Appellant, we are satisfied that the trial judge did not commit

reversible error.[4]

III.

The judgment of the district court will be affirmed.

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4. We note, in particular, that we do not regard as inconsistent the jury's findings that there was a constructive discharge and that there was no race or sex discrimination on the part of Morgan. There was evidence from which the jury could have concluded that Appellant was pressured to leave but for reasons wholly unrelated to her race or sex. "Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way." Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 364 (1962).

TO THE CLERK:

Please file the foregoing opinion.

CIRCUIT JUDGE STAPLETON

APPENDIX B-1

Court of Appeals Order Denying Petition for Rehearing In Banc. (9/12/85)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 85-1006 and 85-1007

PLUMMER, ROSALIND M. ESQUIRE,

Appellant

vs.

GEORGE AMAN, III, ET AL.,

Appellees

SUR PETITION FOR REHEARING

PRESENT: ALDISERT, Chief Judge, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked

for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
CIRCUIT JUDGE STAPLETON

_____
Circuit Judge

Dated: September 12, 1985

APPENDIX B-2

Court of Appeals Order Denying Motion for Clarification of Memorandum Opinion of 8/14/85. (9/12/85)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 85-1006/7
PLUMMER, ROSALIND M. ESQUIRE, Appellant
vs.
GEORGE AMAN, III, et al.

Present: ALDISERT, Chief Judge,
STAPLETON and MANSMANN,
Circuit Judges.

1. Petition by appellant for clarification and rehearing in banc of memorandum opinion of August 14, 1985, and for reconsideration en banc of denial of appellant's motion for oral argument on appeal.

2. For your information, the memorandum opinion was filed and judgment entered on August 14, 1985.

in the above-entitled case. Any answer which would be due by September 7, 1985, will be forwarded to you upon receipt of same.

Respectfully,

Deputy Clerk
Direct Dial 597-3134

enc.

The foregoing Motion for clarification is denied.

BY THE COURT, CIRCUIT JUDGE STAPLETON

Dated: September 12, 1985

APPENDIX B-3

Court of Appeals Order of August 7, 1985, denying Petitioner's Motion for Oral Argument on appeal.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

August 6, 1985

Nos. 85-1006 and 85-1007
PLUMMER, ROSALIND M. ESQUIRE, Appellant
vs.
GEORGE AMAN, III, et al.
(E.D.Pa. Civil 80-3676)

Present: ALDISERT, Chief Judge, and
STAPLETON and MANSMANN,
Circuit Judges.

1. Appellant's motion for oral argument,

in the above-entitled cases listed for disposition on the merits on Friday, August 9, 1985.

Respectfully,

Deputy Clerk 7-1092

enc.
dt

The foregoing Motion is denied.

BY THE COURT,

Chief Judge

Dated: August 7, 1985

APPENDIX C-1

Opinion, Findings of Fact, Conclusions of Law and Order of October 16, 1984.
(Entered 10/16/84)

IN THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

ROSALIND PLUMMER, ESQUIRE	:	CIVIL ACTION
	:	ENTERED 10/16/84
v.	:	
	:	
GEORGE AMAN, III, et al.	:	NO. 80-3676

OPINION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

VanARTSDALEN, J. October 16, 1984

Plaintiff, a black female lawyer, filed an action against the partners of the law firm of Morgan, Lewis and Bockius, charging them with racial and sexual discrimination in their employment of her as an associate attorney of the firm. Plaintiff was employed by Morgan, Lewis and Bockius as an associate attorney upon her graduation from law school, and continued in that employment for about

one year before she resigned effective in September, 1979.

Plaintiff alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C., § 2000(e), the Civil Rights Acts of 1870 and 1861, 42 U.S.C., §§ 1981 and 1985; and the Equal Pay Act, 29 U.S.C., Sec. 206(d). Following a protracted and contentious discovery process, trial commenced with jury selection on August 1, 1984. Plaintiff was represented by counsel at various times during the pretrial proceedings but represented herself at the trial. The case was submitted to the jury on August 15, 1984, and the jury returned its verdict by answering written interrogatories on August 16, 1984. On the basis of the answers to the special interrogatories, judgment was entered in favor of the defendants on all claims except the Title VII claims.

The interrogatories propounded and the jury's answers thereto were as follows:

SPECIAL VERDICT ON WRITTEN INTERROGATORIES PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 49(a)

1. Do you find by a preponderance of the evidence that the law firm of Morgan, Lewis and Bockius intentionally discriminated against Rosalind Plummer with respect to her compensation, terms, conditions or privileges of employment with Morgan, Lewis and Bockius because of her race (black)?
YES ___ NO X

2. Do you find by a preponderance of the evidence that the law firm of Morgan, Lewis and Bockius intentionally discriminated against Rosalind Plummer with respect to her compensation, terms, conditions or privileges of employment with Morgan, Lewis and Bockius because of her sex (female)?
YES ___ NO X

3. Do you find by a preponderance of evidence that two or more partners of Morgan, Lewis and Bockius

conspired for the purpose of depriving Rosalind Plummer, either directly or indirectly, of equal rights with respect to compensation, terms, conditions or privileges of employment with Morgan, Lewis & Bockius because of her race (black)?
YES ___ NO X

(a) If YES, did one or more of the conspirators do or cause to be done any act in furtherance of the object of the conspiracy?
YES ___ NO ___

4. Do you find by a preponderance of the evidence that Morgan, Lewis & Bockius discriminated against Rosalind Plummer on the basis of her sex (female) by paying her wages at a rate less than the rate at which Morgan, Lewis & Bockius paid male employees for equal work on jobs which required equal skill, effort and responsibility?
YES ___ NO X

(a) If YES, do you find such discrimination was by reason of Rosalind Plummer receiving a $3,000 annual raise at the end of her first year of employment, instead of a larger annual raise?
YES ___ NO ___

(b) If YES, do you find such discrimination was by reason of denying her reimbursement for attending the National Bar Association Convention?
YES ___ NO ___

5. Do you find by a preponderance of the evidence that Morgan, Lewis & Bockius intentionally treated Rosalind Plummer to her detriment as an employee different from any other employee similarly situated because of her race (black)?
YES ___ NO X

(a) If YES, do you find by a preponderance of the evidence that the reasons given at trial by Morgan, Lewis & Bockius were a pretext for race discrimination?
YES ___ NO ___

6. Do you find by a preponderance of the evidence that Morgan, Lewis and Bockius intentionally treated Rosalind Plummer to her detriment as an employee any different from any other employee similarly situated because of her sex (female)?
YES ___ NO X

(a) If YES, do you find by a preponderance of the evidence that the reasons given at trial by Morgan, Lewis and Bockius were a pretext for discrimination on account of her sex?
YES ___ NO ___

7. Do you find by a preponderance of the evidence that Morgan, Lewis & Bockius constructively discharged Rosalind Plummer as an employee?
YES X NO ___

(a) If YES, was such a discharge by reason of race discrimination?
YES ___ NO X

(b) If YES, was such discharge by reason of sex discrimination?
YES ___ NO X

The remedy provided under Title VII is essentially equitable. A Title VII plaintiff has no right to trial by jury. Plummer v. Western Int'l Hotels Co., 656 F.2d 502, 504 n.6 (9th Cir. 1981). Claims under the Equal Pay Act and sections 1981 and 1985 are

essentially legal and the plaintiff is entitled to a jury trial, if properly demanded. Lorillard v. Pons, 434 U.S. 575, 580 (1978) (Equal Pay Act); Lincoln v. Board of Regents of the University System of Georgia, 697 F.2d 928, 934 (11th Cir. 1983), cert. denied, 104 S. Ct. 97 (section 1981 claim). When a plaintiff properly combines a Title VII claim with legal claims triable to a jury, the right to a jury trial in the legal action encompasses the issues common to both. See Curtis v. Loether, 415 U.S. 189, 196 n.11 (1974); Lincoln, 697 F.2d at 934. The plaintiff properly combined her Title VII claims with her sections 1981 and 1985 and Equal Pay Act claims. The evidence as to all claims, legal and equitable, was presented at the trial. Counsel was advised that I would treat the jury's answers to

interrogatories as advisory, insofar as the answers would be applicable to the Title VII claims. If the facts as found by the jury are accepted as correct for deciding the Title VII claims of racial and sexual discrimination in employment, it is readily apparent that judgment should be entered in favor of defendants on the Title VII claims.

The jury's factual findings as set forth in the answers to the interrogatories will be accepted and adopted by me in adjudicating the Title VII claims. It may be that I am required to do so under the doctrines of res judicata and collateral estoppel, at least as to the racial discrimination claim and that part of the discrimination in employment claim based on unequal pay because of plaintiff's sex. When a party has the right to a

trial by jury on an issue of fact, the jury's determination should be equally binding in both legal and equitable proceedings. Lincoln, 697 F.2d at 934.

When a plaintiff's Title VII race discrimination claim is based, as here, on disparate treatment, the essential elements of the claim are identical to those under section 1981. Id. at 935 n.6. Thus the jury's determination of the section 1981 claim necessarily decided all the essential elements of the Title VII race discrimination claim. The same is true as to any claim of discrimination based on disparate pay because of plaintiff's sex. Thus any findings of fact on the Title VII claim that would be inconsistent with the findings of fact made by the jury on the sections 1981, 1985 and Equal Pay Act claims would probably be error as a

matter of law. Nevertheless, apparently the trial judge must still make findings of fact and determine all issues presented on the Title VII claims. In this case, my independent appraisal of the evidence convinces me that plaintiff has not established her claim by a preponderance of the evidence. Thus, there is no reason to be concerned with a possible inconsistency between the jury's findings and the findings of the trial judge, sitting in equity. There is none.

Findings of Fact

1. Plaintiff is Rosalind M. Plummer. She is a black female.

2. Defendants are partners of the law firm partnership of Morgan, Lewis & Bockius (MLB).

3. Plaintiff's complaint alleges that she was discriminated against

because of her race and sex in her employment as an associate attorney at MLB. Count 1 of the complaint alleges violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e; Count 2 alleges violation of 42 U.S.C. §1981; Count 3 alleges, inter alia, violation of the "Civil Rights Act of 1981 [sic], 42 U.S.C. §§[sic] 1981" but presumedly intends to allege a conspiracy in violation of 42 U.S.C. §1985; Count 4 alleges violation of the Equal Pay Act, 29 U.S.C. §206(d).

4. Plaintiff graduated from Swarthmore College and entered Harvard Law School. She actively sought employment as a summer associate with MLB, and was hired in such position between her second and third year at law school, during the months of June, July and August, 1977. Her work for that

period was evaluated as satisfactory by MLB. She was offered full-time employment as an associate attorney with MLB to commence in August, 1978, after her graduation from Harvard Law School.

5. Plaintiff accepted the offered employment as an associate attorney at MLB, after being assured by MLB that her performance would be evaluated strictly on the basis of merit and without regard to her race or sex.

6. Plaintiff, along with the other law school graduates hired by MLB to commence employment as associates in the fall of 1978, received $3,000 (less applicable taxes) from MLB after graduating from law school, but prior to commencement with MLB. This sum was provided as financial support for the period between graduation and commencement of work, during which

period the newly hired associates were expected to study and take the Pennsylvania Bar Examination.

7. Plaintiff took the Pennsylvania Bar Examination held in July, 1978. She failed to pass the examination, and was so informed in October, 1978, after she had started to work at MLB. She was the only newly hired associated of MLB who that year failed to pass the bar examination.

8. Plaintiff commenced her work on August 31, 1978. Thomas Kittredge, Assistant Administrator of the Litigation Section of MLB, had been informed that it was expected that she would report for work on August 23, 1978. Mr. Kittredge assigned her four projects involving cases being then handled by Arthur Littleton, a litigation section partner of MLB. The

assigned tasks were of the type and complexity normally assigned to newly hired law school graduate associates of the firm, although there was some extra time pressure because plaintiff commenced work one week later than planned. Mr. Littleton gave her the normal amount of advice, guidance and supervision as to those tasks.

9. Shortly after starting work at MLB, plaintiff requested that she receive some major case assignment. She was assigned a research project involving the "Queenie" case, an important piece of litigation. She completed the assignment, made a brief oral presentation to Denis Brenan, a litigation section partner of MLB having major responsibility for the "Queenie" litigation. Plaintiff was disappointed with his reception of her presentation

and also disappointed that she was not assigned as one of the lawyers of the firm who comprised the "Queenie" litigation team.

10. Some time in October, 1978, MLB learned that plaintiff had failed to pass the bar examination. Several of the partners discussed the matter with her in a sympathetic manner and in an attempt to be helpful and encouraging to her. John Lewis, the Litigation Section Administrator and a partner of MLB, told her that she could take as much time off from work as she needed to study for the next examination scheduled for February, 1979. To permit her to do this, plaintiff was not given any long-term assignments prior to retaking the bar examination. Because she was ineligible for admission to the bar of all courts, plaintiff could not sign any pleadings

for filing as the attorney of record. She was granted an excused absence from January 29, 1979 to February 16, 1979, to prepare for the bar examination. Plaintiff also charged as vacation time the period from February 20, 1979 to February 28, 1979.

11. MLB formally evaluates associate attorneys semi-annually. Each partner for whom an associate has done a not insubstantial amount of work is required to complete and submit to the Professional Evaluation Committee of MLB an evaluation report on the associate attorney. The reports are then reviewed by the Professional Evaluation Committee and the Committee gives each associate attorney an overall rating based upon the evaluation reports. MLB's annual salary increases for associate attorneys are set by the Professional Evaluation

Committee as part of the semi-annual review conducted in June of each year. The review and ratings are discussed with each associate attorney individually by the section head or a section committee of the section to which the associate is assigned.

12. The evaluation report form used in 1978 and 1979 requested the reporting partners to rate associates in five categories: (1) legal ability, (2) industry, (3) professional judgment, (4) cooperativeness, (5) attraction of new clients or development of existing clients. There was also a category for an overall rating with space provided for an explanation. A numerical rating scale of "1" to "5" was used with "1" the lowest rating, "5" the highest and "3" the expected norm for first year associates to be considered "on track"

for eventual partnership consideration. A rating of "2" indicated that the associate need substantial improvement.

13. During the period of September through December, 1978, plaintiff did the majority of her work under the supervision of Arthur Littleton. Mr. Littleton's evaluation for plaintiff rated her a "2" for legal ability, industry, professional judgment and attraction of new clients or development of existing ones. He rated her a "3" in cooperativeness and gave her an overall rating of "2." Mr. Littleton's written comments stated that plaintiff had only been with MLB a short time but she had not impressed him and that plaintiff submitted "cut and paste" documents and rough drafts when finished products were sought or required.

14. During the period December, 1978 through May, 1979, plaintiff performed the majority of her assignments for Litigation Section partners Arthur Littleton, Joseph Torregrossa, Raymond Cullen, Thomas Kittredge, and Business and Finance Section partner Howard Shecter. Each of the above partners submitted an evaluation report of the plaintiff. Plaintiff received an overall rating of "2" from Messrs. Shecter, Kittredge and Littleton; a "2+" from Mr. Torregrossa; and a "3" from Mr. Cullen.

15. The comments included on the reports were generally consistent. Plaintiff was noted as having below standard oral and writing skills. The reports also mentioned that she occasionally submitted rough drafts, had trouble handling multiple assignments

and needed counseling and close supervision. Several of the reports noted that plaintiff had experienced personal problems which may have accounted for her substandard performance but were thought now to be "behind her." Messrs. Littleton and Torregrossa noted that plaintiff's work, while generally below par, evidenced good analytical and legal ability and exhibited the potential for quality work.

16. Plaintiff was given an overall rating of "2" by the Professional Evaluation Committee at its May 30, 1979 meeting after considering the evaluation reports that had been submitted. Plaintiff received the lowest rating of the nine first year MLB associates.

17. Of the nine first-year MLB associates, six were white male, two

were black females (including plaintiff), and one was a white female. The other black female received an overall rating of "3-"; the remainder of the new associates received either a "3" or "3+" overall rating.

18. In early June, 1979, plaintiff met with members of the Litigation Section, to which she had been assigned, to discuss her performance and rating. Present at the meeting were Thomas Masterson, Chairman of the Litigation Section; William Taylor, Vice-Chairman; John Lewis, Administrator; James Jennings, partner and a member of the Professional Evaluation Committee. Plaintiff was told by the Chairman that the evaluation from the Professional Evaluation Committee showed that she had serious problems with her work. He pointed out that the evaluation reports

noted failure to complete work on time, failure to provide work in finished or final form, improper work habits and generally substandard work. She was also advised that there were favorable as well as unfavorable comments in the reports. There were some comments to the effect that on occasion she showed real talent. Plaintiff was further told that unless the overall quality of her work improved, she would not be permitted to remain with the firm. Plaintiff requested to see the individual reports. John Lewis read to her the substantive critical comments in the reports, but in keeping with established firm policy, did not allow her to personally examine the reports.

19. Plaintiff received a $3,000 increase in salary effective July, 1979. The other eight associates who

started work in the fall of 1978 each received a raise of $4,500.00. The lower salary increase received by plaintiff was due entirely to her unsatisfactory overall evaluation rating of "2" which was lower than any other first-year associate. Her lower salary increase was not in any way caused by her being black or female.

20. Plaintiff attended a corporate practice seminar at Harvard in April, 1979 and a copyright seminar at New York University in June, 1979 for which she was reimbursed some, if not all, of her expenses by MLB. MLB had a written policy that strongly encouraged both partners and associates of MLB to be active in professional bar associations and in continuing educational programs. Upon proper application, the managing partner of the firm would ordinarily

approve reimbursement for the expenses of partners and associates attending seminars and bar association functions. During the 1978-1979 period, however, no other first year associate at MLB attended, at firm expense and on firm time, more than one continuing educational program.

21. In early May, 1979, plaintiff requested approval to attend, at the expense of MLB, the National Bar Association convention to be held in Los Angeles, California, during the summer of 1979. Howard Shecter, managing partner for MLB, sent plaintiff a memorandum on July 25, 1979, denying the request to be reimbursed for the expenses of attendance. The reasons for this denial were that the expenses to go to the West Coast would be substantial; as a general practice, associates with

less than one year's employment were not authorized to attend bar association conventions at the expense of MLB; she had already been absent from work in excess of five weeks due to studying for the bar examination, illness and vacation; her time would be better spent concentrating on work assignments; she had already attended and been reimbursed for two educational seminars; and no other associates had requested permission to attend that convention or any other at firm expense.

22. Plaintiff notified John Lewis, in writing, that she would be "out of the office from July 23, 1979 to August 10, 1979, to attend the NBA [National Bar Association] Conference and for vacation." (Exhibit P-28). The records of MLB show that during that three-week period, two weeks were

charged to vacation time and one week to "professional time." During this period plaintiff attended the National Bar Association Convention.

23. While plaintiff was an associate at MLB, the litigation section maintained status report sheets that were to be filed by associates for the purpose of determining the work load of associates and assigning additional tasks among them. The form was designed to require minimal effort on the part of an associate by checking the appropriate boxes in answer to the following categories:

(1) I am fully engaged for the next two weeks.

(2) I can accept limited assignments for the next two weeks.

(3) I can accept substantial assignments for the next two weeks.

(4) I am fully engaged for the next 15 to 60 days.

(5) I can accept limited assignments for the next 15 to 60 days.

(6) I can accept substantial assignments for the next 15 to 60 days.

The form was sent at various times to the associates.

24. Between September 26, 1978 and September 5, 1979, sixteen status report sheets were sent to the associates of the litigation section. Of the sixteen report sheets sent to plaintiff, she failed to respond at all on eight occasions. Of the eight reports that she did file, four were filed in 1978,

and on each one she reported that she was fully engaged for the next two weeks and on one she stated she was also fully engaged for the next 15 to 60 days. Four reports were filed in 1979. On January 18, 1979, she reported that she was fully engaged for the next two weeks. The next report was filed on March 27, 1979, in which she said she could accept substantial work in the next two weeks; on July 10, 1979, she reported she could accept only limited assignments during the next two weeks and would be going on vacation; on September 5, 1979, she reported that she could take substantial assignments.

25. During the time that plaintiff was employed by MLB, she was given sufficient assignments to keep her fully occupied, or if not fully occupied as she claimed, it was because she failed

to file reports so indicating. On only two reports did she state she could accept substantial assignments. One was on March 27, 1979, shortly after taking the bar examination for the second time. The other was on September 5, 1979, a few days before the effective date of her resignation.

26. All lawyers at MLB, both partners and associates, were required to maintain and file daily time sheets on a current basis. The last date for which plaintiff filed any recorded working time was for July 20, 1979. Plaintiff consistently filed her time sheet reports late and they were not always accurate.

27. After returning from the National Bar Association Convention, plaintiff had further discussions with partners of the firm concerning her low

evaluations. On or about September 10, 1979, she talked with Howard Shecter, the managing partner, and told him that her working conditions were, to her, intolerable. Some of the problems that plaintiff perceived were her low evaluation and rating, her lesser salary increase, and the failure to assign her to substantial cases presenting chances for advancement. Mr. Shecter tried do dissuade her from leaving the firm.

28. A memorandum dated September 11, 1979, from the plaintiff to Thomas Kittredge, stated in part: "As of Friday, September 14, 1979, I will not longer be with MLB." She was paid at the annual salary rate through the end of September.

29. Three former black associates of MLB, Robert L. Archie, Philip S. Asbury and Barry Robinson, by their own

testimony, were in no way discriminated against by MLB and did not perceive that they were. All left the firm voluntarily and not because of any urging by MLB.

30. A former black female associate, Gayle Nelson, who wanted to transfer to the Washington, D.C. office of MLB was unable to do so because of lack of an opening in the Washington, D.C. litigation section. She had been in the litigation section of the Philadelphia office. MLB tried to accommodate her personal preferences as to employment in Washington, D.C., but was unable to do so. Consequently, Gayle Nelson moved to Washington, D.C., and left the firm of MLB for other employment.

Conclusions of Law

1. This court has subject-matter jurisdiction, and personal jurisdiction over all parties to this litigation. Venue in this district is proper.

2. MLB is an employer within the definition of Section 701(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, and MLB is subject to the provisions of the statute.

3. Plaintiff has failed to prove by a preponderance of the evidence that MLB discriminated against plaintiff as to her compensation or in any term, condition or privilege of employment because of her race, color, religion, sex or national origin.

4. Plaintiff proved by a preponderance of the evidence that she is a black female, and as such is a member of a class of persons protected

by the Civil Rights Act of 1964. She also proved by a preponderance of the evidence that she received lower evaluations as to her work and a lower salary increase than other first year associates of MLB hired in 1978 for the Philadelphia office. Defendants met their burden of coming forward with evidence and articulating nondiscriminatory reasons for the disparate treatment; namely, that her work performance was unsatisfactory and of a poorer quality than that of the other first year associates hired by MLB. Plaintiff failed to sustain her burden of persuasion that the reasons proffered by MLB were a pretext for racial and/or sexual discrimination.

5. Plaintiff failed to prove by a preponderance of the evidence that she was treated any differently than any

other first year associate of MLB as to work assignments, help and assistance, advance opportunities, office space, salary, other financial benefits, or any other term or condition of employment because of her color, race or sex.

6. Plaintiff resigned her position as an associate attorney of the law firm of MLB; she was not discharged because of her color, race or sex.

Discussion

Plaintiff failed to convince the jury, as well as the trial judge, by a preponderance of the evidence that she was discriminated against by MLB in any of the terms, conditions or privileges of her employment as an associate attorney of the firm by reason of her color, race or sex. On the contrary, the evidence clearly establishes that she received exactly the same treatment

as all of the other newly-hired associate attorneys who had recently graduated from law school, except that by reason of the inferior quality of her work, she received a lower and unsatisfactory evaluation rating and, as a result, a lower salary increase.

In an attempt to prove her case, plaintiff called the following partners of MLB as witnesses: Howard Shecter (managing partner during the time of plaintiff's employment by MLB); Richard Brown, Jr.; Arthur Littleton; George Aman, III; Joseph Torregrossa; Harry Regan; Raymond Cullen; Thomas Kittredge; John H. Lewis, Jr.; and Denis V. Brenan. She also called Robert L. Archie and Barry Robinson, former black male associate attorneys of MLB, and herself as witnesses. Defendants called additional witnesses including Thomas

Masterson (a partner of MLB); Dennis Morikawa (a partner of MLB of oriental national background); Philip S. Asbury (a black former associate of MLB); and Robert J. Donaghy (a former associate of MLB).

Defendants also proffered into evidence a video-taped deposition of retired MLB partner, Benjamin M. Quigg, Jr., who was in Europe at the time of the trial. Defendants properly notified plaintiff in advance of trial that they would take his trial deposition. Plaintiff did not appear at the deposition and at trial stated at a side-bar conference that she did not receive such notice although defense counsel asserted it had been mailed to her proper address. Under those circumstances, I ruled favorably to the plaintiff and precluded the use of

Mr. Quigg's video-deposition. Because John Lewis was scheduled to be on vacation in Colorado at the time of the trial, at a pretrial conference, defendants advised plaintiff of that fact, and attempted to arrange his trial deposition. Plaintiff also objected to such procedure maintaining that the jury needed the benefit of live testimony. As a result, Mr. Lewis was called back from his vacation and did testify.

With the exception of the testimony of the plaintiff herself, no witness provided any direct testimony of any discrimination on account of race, color or sex. Most of the witnesses provided direct testimony to the contrary, although, of course, the partner-defendants' testimony in that respect was not surprising. In many instances, the testimony of plaintiff

was in direct and irreconcilable conflict with other witnesses who testified on the same issue.

By way of example only of such direct conflicts of testimony, one or more of the evaluation reports included a reference to plaintiff's personal problems, and oral testimony provided some detail of those problems. Plaintiff testified, in effect, that she never related to any of the attorneys at MLB any personal problems she may have had and that in fact she had no personal problems that influenced her work performance. Despite this, she also testified that one of the reasons (if not the main reason) she failed the bar examination the first time was because she had to stay up late to help take care of her sister's ill child and

overslept the next morning, thereby missing a session of the bar examination. She testified that she never gave any excuse to anyone at MLB as to her reason for failing the examination, and she repeatedly testified that she was unconcerned about having to retake the examination.

Despite the notations in the evaluation reports that were submitted as exhibits, and the oral testimony of some of the attorneys who prepared the reports, in substance, plaintiff depicted as incorrect practically every critical remark about her work. She denied that she provided "cut and past" memoranda, but complained that for several weeks she had no secretary. She testified, without any corroboration, that because of the one research job she did on the "Queenie" case, a major

matter then in litigation, she became known in the office, at least among some of the associates, as the "class action expert." She insisted that none of the partners, prior to submitting the evaluation reports, ever made any statements to her that expressed any dissatisfaction or concern about the quality, timeliness or effectiveness of her work, and that she fully expected to receive a good evaluation in May of 1979 and would be rewarded for the high quality of the work she had completed.

Two additional examples of plaintiff's testimony being absolutely contrary to that of witnesses' will be mentioned. Plaintiff testified at length and quite emotionally regarding certain humiliating treatment directed at her by Denis Brenan. According to plaintiff, the culmination of that treatment

reached a peak at a dinner at the Union League (an exclusively male club) with plaintiff, Denis Brenan and Robert Donaghy being the only persons in attendance. Plaintiff testified that Mr. Brenan made several derogatory remarks about blacks and females in order to embarrass and humiliate her. Defendants called Robert Donaghy, who is no longer with MLB. Mr. Donaghy testified that he attended only one dinner engagement with plaintiff while at MLB. It was held at the Racquet Club, not the Union League, and that at least three or four other persons were in attendance besides himself, plaintiff and Mr. Brenan. Mr. Donaghy unequivocally denied that Mr. Brenan treated plaintiff different from any other associate or that he embarrassed or humiliated plaintiff. Mr. Brenan's

testimony, not surprisingly, confirmed that of Mr. Donaghy.

A final example is particularly compelling. Throughout the pretrial proceedings and during her opening remarks to the jury, plaintiff made much of defendants' status as one of the largest metropolitan law firms in the country. Plaintiff stated that her stand against MLB was so unpopular that three attorneys representing her were either forced to resign or intimidated into doing so. Therefore, plaintiff argued, she was representing herself. Defendants introduced evidence that plaintiff's first counsel merely helped her draft the complaint and withdrew his appearance shortly thereafter.
H. Patrick Swygert and Robert L. Archie also entered appearances for plaintiff. According to uncontradicted testimony,

Mr. Swygert withdrew his appearance when appointed to an administrative position at Temple University. The testimony regarding Mr. Archie's withdrawal was nothing short of remarkable.

Plaintiff testified on cross-examination that, following a discovery conference with the court, Mr. Archie informed her that he could no longer represent her. Plaintiff testified that Mr. Archie requested that she write a letter to him discharging him. The letter in question, dated June 22, 1983, provided in part:

> In view of what occurred during our meeting as late as June 22, 1983, and in light of other evidence of unethical conduct by you which has come to my attention, including your theft and improper representation of one of my contracted clients, as well as the less than adverserial [sic] or competent handling of my case by your firm, I am, effective this day,

> discharging and terminating you and your firm as my counsel in the above referenced case.

Despite the language and tenor of the letter discharging Mr. Archie, plaintiff insisted that she did not discharge him, rather, Mr. Archie resigned from the case and asked plaintiff to write the above letter!

When called to the stand by defendants, Mr. Archie had a somewhat different recollection. He testified that he did not resign but was discharged by plaintiff. He further testified that he never asked plaintiff to write a letter discharging him. Finally, Mr. Archie denied all of the accusations contained in plaintiff's letter of June 23, 1983. It is absolutely astonishing, in light of Mr. Archie's testimony and plaintiff's

letter, for plaintiff to continue to assert that Mr. Archie resigned of his own accord. Yet, that is precisely what she did.

The conflicts in the testimony between plaintiff and the other witnesses were and are clearly matters for the fact finder. The jury concluded that plaintiff had failed to meet her overall burden of proof of discriminatory treatment. So far as my duty as a fact finder as to the Title VII claim, rather than rule specifically on each and every factual conflict as to credibility, I simply conclude that plaintiff has not met her burden of proof. Thus, I need not directly pass on plaintiff's credibility.

Plaintiff's complaints of unfair treatment are many. She complained that when she first reported for work the

assignments given to her were too compressed for time of completion, were difficult, and were handed to her without any guidance or assistance as to how to proceed. Arthur Littleton testified in detail concerning the original assignments, of the assistance provided plaintiff, and the reason for the time constraints. His time records confirmed many meetings with her. The assignments were no more difficult than those frequently presented to new associates, nor were the time or other restrictions more onerous.

Some of the partners found it difficult on occasions to locate plaintiff. Her secretary, on at least one occasion, was unable to account for her whereabouts. This led to a considerable amount of rather unimportant testimony as to the location

of plaintiff's office and her explanation that she could have been in the library without her secretary being aware of where she was. The evidence seems quite clear that at least on some occasions, partners had difficulty finding her at work.

The records show that during the period of approximately one year that she was an associate in the firm she attended at firm expense two seminars, one in New York and another in Boston. One of her major claims of racial discrimination is that she was not permitted to be reimbursed for the expense of attending the National Bar Association Convention in Los Angeles. Although the National Bar Association is a professional legal association composed either entirely or primarily of lawyers who are black or of a racial

minority, the evidence is quite clear that race was not a factor in this rejection. Although an associate or a partner had previously been permitted to attend the National Bar Association Convention held in Washington, D.C., the time and expense involved was far less than that sought by plaintiff.

Plaintiff argued to the jury that the reason she was hired and discriminated against was to enable MLB to continue to recruit at the prestigious eastern "Ivy League" law schools that required "on campus" recruitments to be nondiscriminatory as to race and sex.

Plaintiff argued that she, and on occasion a few other blacks and other minorities and females, would be hired as associates with MLB, only to be kept for a short period during which time

they would be given menial tasks, criticized, made the subject of improper remarks, insulted, intentionally given low evaluations, and eventually forced to resign.

It is difficult to accept plaintiff's rationale. The evidence presented clearly establishes that she was treated quite sympathetically and courteously when it became known that she failed the bar examination. The partners under whom she worked, even according to her own testimony, praised some of her work and encouraged her. When she decided to resign some time shortly after returning from the National Bar Association Convention at Los Angeles, several of the partners genuinely tried to dissuade her. Surely, if in fact MLB intended from the beginning to discriminate against her

because of her race or sex and to force her to resign or be discharged, the opportunity to discharge her presented itself when she failed to pass the bar examination. Although MLB has apparently been tolerant of associates in the past who may have failed, to allow an associate to remain after failure, and without any loss or reduction in salary and with time off to study for the next examination, especially where, according to plaintiff's own testimony, she offered no excuse for her failure to pass, is more an act of charity than evidence of an intentional pre-planned course of racial and sexual discrimination.

The jury did find that plaintiff was constructively discharged, but that such discharge was not the result of any racial or sexual discrimination.

Apparently, the jury concluded that at some point in time, the partners of the Litigation Section and/or other partners decided that the quality of her work was such that she would have to be terminated, if she did not resign, and thereafter proceeded to make her working conditions such as to bring about her resignation. In the absence of the jury's verdict, I would not have so concluded. The jury expressly found that this constructive discharge was not motivated by racial or sexual discrimination. Thus, even as an advisory verdict finding, it is not essential to the Title VII claims. A discharge, whether actual or constructive, does not impose liability under Title VII unless, as relevant to this case, the discharge is because of color, race or sex. The jury found it

was not so caused, and thus there is no liability.

The interrogatories presented to the jury included the word "intentional" in reference to the claimed acts of discrimination. See Interrogatories 1, 2, 5, and 6. To the extent that discrimination may not have to be intentional to constitute an actionable wrong under a Title VII claim (ordinarily a disparate impact claim), on the basis of all of the evidence presented, plaintiff failed to prove by a preponderance of the evidence that MLB discriminated against plaintiff or treated her in any way different from any other employee of MLB on account of her color, race or sex. There having been no disparate treatment on account of plaintiff's color, race or sex, the

issue does not arise as to whether intent is an element.

The foregoing findings of fact and conclusions of law were prepared by me without the assistance of any post-trial proposed findings of fact or conclusions of law submitted by plaintiff. Counsel were afforded an opportunity to make such presentations. Rather typically, I think, plaintiff chose not to file any, but instead filed extensive objections, supported by a brief to defendants' proposed findings and conclusions because defendants filed a few days late. A separate order was thus necessitated by plaintiff's objections to defendants' proposed findings and conclusions that at best serve only as an aid to the court. See Order dated October 11, 1984.

To the extent that the foregoing "Discussion" contains facts and conclusions of law not specifically set forth in the foregoing "Findings of Fact" and "Conclusions of Law," they shall be deemed do be additional findings of fact and conclusions of law.

IN THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

ROSALIND M. PLUMMER, ESQUIRE	:	CIVIL ACTION
v.	:	
GEORGE AMAN, III, et al.	:	NO. 80-3676

ORDER

It is Ordered, on the basis of the foregoing findings of fact, conclusions of law and discussion, and a review of the entire trial record in this case, that judgment is entered in favor of all defendants and against the plaintiff in Civil Action No. 80-3676 on all claims asserted by plaintiff on the basis of violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C §2000e and any and all other claims as to which plaintiff is not entitled to a jury trial and that were tried nonjury.

BY THE COURT:

Donald W. VanArtsdalen, J.

October 16, 1984.

APPENDIX C-2

District Court Order of August 20, 1984, amending Judgment of August 16, 1984. (Entered 8/21/84)

IN THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

ROSALIND M. PLUMMER, ESQUIRE	:	CIVIL ACTION
v.	:	
GEORGE AMAN, III, et al.	:	NO. 80-3676

ORDER

It is ordered that the judgment entered on August 16, 1984, in Civil Action 80-3676 is amended to read as follows:

In accordance with the jury's answers to written interrogatories pursuant to Federal Rule of Civil Procedure 49(a), judgment is entered in favor of all of the defendants, individually and as partners doing business under the name of Morgan, Lewis & Bockius and against the plaintiff, Rosalind M. Plummer, Esquire, on all claims asserted that were tried by jury;

that is, on all claims except the claims asserted under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000(e)-2, which claims were tried nonjury together with the jury trial of all other claims; said claims under Title VII of the Civil Rights Act of 1964 will be subject to a determination by the undersigned trial judge to be rendered after receipt of post-trial proposed findings of fact, conclusions of law, and/or briefs to be submitted by the parties in accordance with the time schedule provided in open court at the conclusion of the trial.

BY THE COURT:

_____

Donald W. VanArtsdalen, J.

August 20, 1984.
Entered August 21, 1984.

APPENDIX D

Civil Judgment of August 16, 1984. (Entered 8/17/84)

IN THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

ROSALIND M. PLUMMER, ESQUIRE	:	CIVIL ACTION
v.	:	
GEORGE AMAN, III, et al.	:	NO. 80-3676

CIVIL JUDGMENT

Before THE HONORABLE DONALD W. VanARTSDALEN

AND NOW, this 16th day of August, 1984 in accordance with the jury's answers to special interrogatories, IT IS ORDERED that Judgment be and the same is hereby entered in favor of the defendants, the partners individually and doing business as Morgan, Lewis & Bockius, and against the plaintiff, Rosalind M. Plummer, Esquire.

BY THE COURT:

ATTEST: Marguerite L. McCaffrey
Deputy Clerk

Entered: 8/17/84

APPENDIX E

Text of Constitutional and Statutory Provisions Involved

TEXT OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

THE JURY SELECTION AND SERVICE ACT OF OF 1964;

1. 28 U.S.C., SECTION 1866(c):

Except as provided in section 1865 of this Title or in any jury selection plan provision adopted pursuant to paragraph (5) or (6) of section 1863(b) of this title, no person or class of persons shall be disqualified, excluded, excused, or exempt from service as jurors: Provided, That any person summoned for jury service may be . . . (2) excluded by the court on the ground that such person may be unable to render impartial jury service as a juror or would be likely to disrupt the proceedings, or (3) excluded upon peremptory challenge as provided by law, or (4) excluded pursuant to the procedure specified by law upon challenge by any party for good cause shown, or (5) excluded upon determination by the court that his service as a juror would be likely to threaten the secrecy of the proceedings, or otherwise adversely affect the integrity of jury deliberations.

2. 28 U.S.C., SECTION 1870. CHALLENGES:

In civil cases, each party shall be entitled to three peremptory challenges. ...

All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court.

The Equal Pay Act, 29 U.S.C., SECTION 206(d)(1). PROHIBITION OF SEX DISCRIMINATION:

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, . . .

THE CIVIL RIGHTS ACTS,

1. 42 U.S.C., SECTION 1981. EQUAL RIGHTS UNDER THE LAW:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

2. SECTION 1985(3). CONSPIRACY TO INTERFERE WITH CIVIL RIGHTS (Depriving persons of rights or privileges):

If two or more persons in any State or territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; ...

3. SECTION 2000e-2 (TITLE VII):

(a) It shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin. . . .

APPENDIX F

Memorandum Opinion and Order of October 18, 1984. (Rule 59) (Entered 10/19/84)

PETITIONER'S PREFACE TO APPENDIX F

In his Memorandum and Opinion in response to Petitioner's Rule 59 New Trial Motion, the trial judge incorrectly stated that one basis for denying the motion was that it was filed on September 4, 1984, and was therefore untimely.

However, as the docket entries clearly reflect, Petitioner's Rule 59 motion was filed and docketed on August 27, 1984.

The Rule 59 Motion was therefore timely filed in that it was filed well within 10 days of the entry of both the trial judge's final judgment and his Order amending judgment which were entered on August 17, 1984, and August 21, 1984, respectively.

IN THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

ROSALIND M. PLUMMER, ESQUIRE	:	CIVIL ACTION
	:	ENTERED
v.	:	
	:	OCT. 19, 1984
GEORGE AMAN, III, et al.	:	NO. 80-3676

MEMORANDUM OPINION AND ORDER

VanARTSDALEN, J. October 18, 1984

Plaintiff, a black female attorney, filed an action against the partners of the law firm Morgan, Lewis & Bockius (MLB), alleging that she was discriminated against in her employment with MLB as an associate-attorney because of her race and sex. Plaintiff's action charged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e; the Civil Rights Acts of 1870 and 1861, 42 U.S.C. §§1981 and 1985; and the Equal Pay Act, 29 U.S.C. §206(d). Following a trial that

lasted the better part of two weeks, the jury returned a verdict, by answering written interrogatories, in favor of defendants on all issues triable by a jury. Because applicable case law precluded the jury from deciding plaintiff's Title VII claims, the verdict as to those claims was only advisory. I have since issued an Opinion and Order denying plaintiff's claims under Title VII. Plummer v. Aman, No. 80-3676 (E.D. Pa. October 16, 1984).

Following the jury's verdict rendered by answering the written interrogatories, and the entry of judgment on all claims tried by jury, but prior to entry of my findings of fact, conclusions of law and opinion and order on the Title VII claims, plaintiff filed a pleading entitled, "Plaintiff's

Motion For Mistrial and To Show Cause Why Said Motion Should Not Be Granted."

No motion for a mistrial was made during the trial. A motion for a mistrial after a verdict is returned would appear to be improper. Such a motion would more properly be designated as a motion for a new trial under Federal Rule of Civil Procedure 59. Rule 59 requires a motion for a new trial to be filed not later than ten days after entry of judgment. Judgment on the jury verdict was entered on August 16, 1984, and amended on August 20, 1984, as to all claims triable by jury. The present motion was filed September 4, 1984. If treated as a motion for a new trial, the motion is not timely filed. In addition, the motion asserts facts not of record, which facts are not supported by

affidavits as required by Federal Rule of Civil Procedure 59(c). Thus, plaintiff's motion could and should be summarily dismissed.

Plaintiff's motion seeks relief and has attached a proposed form of order which has no basis in law or logic. The proposed order would require that a lie detector test be administered to the forelady of the jury "under the supervision and with questions prepared by plaintiff's counsel to determine, in part, the actual extent of her association with and influence by the presiding Judge, members of defendants' law firm and of the firm of defendants' counsel, Perry S. Bechtle, as well as third parties in connection with plaintiff's employment discrimination case." After analysis of the lie detector test, plaintiff proposes that I

hold a hearing on the "Motion For Mistrial." Plaintiff, of course, cites no statute, case law or other authority that would allow a district court to require a juror to undergo a lie detector test. Results of lie detector tests, even when voluntarily obtained, are generally not even admissible evidence.

In support of the motion, plaintiff makes numerous factual assertions that are not matters of record. None of these assertions are supported by affidavit or any documentation. Defendants' response pointed out this defect. Thereafter, plaintiff filed an affidavit that contained her recollection of certain matters that can neither be verified or denied from the transcript of the trial. The last sentence of the affidavit states:

"Facts in Motion for Mistrial are true based on information and belief." The affidavit makes no reference to the nature, source or reliability of the claimed information. Simply because plaintiff may believe some fact to exist does not, without more, raise a justiciable issue. Such an affidavit provides no more credence to the factual assertions than the assertions themselves.

For all of the foregoing reasons, the motion shall be denied. Nevertheless, because of the nature of the accusations, some review of the substance of the assertions is appropriate.

Although plaintiff asserts various contentions, all appear to center around the jury selection process and the selection of Mrs. Anna Rogers to the

jury. Because Mrs. Rogers knew the trial judge, plaintiff contends she was somehow improperly influenced by the trial judge.

Plaintiff contends that a denial of her request for individual sequestration of prospective jurors during voir dire prevented "a more detailed and thorough examination. . . for the purposes of challenges for cause, without prejudicing other jurors." She further claims that the "selection process used for the final jury was not a random selection process and did not permit the selection of a jury which was reflective of the racial balance of the prospective jury panel," and that the all-white jury of five women and three men was not a jury of her peers.

Plaintiff alleges that during voir dire "defendants' counsel surfaced the

possibility that Mrs. Anna Rogers might have worked as a secretary for the presiding Judge in the remote past." She also alleges that Mrs. Rogers "had an association with members of the firm of the defendants and of defendants' attorney." Plaintiff further complains that the trial judge told the jury it was general practice and his recommendation that juror number one, who was Mrs. Rogers, be selected as "foreman." Plaintiff also avers, without any supporting facts, except her claim of information and belief, that on at least two occasions, Mrs. Rogers "participated in communications to plaintiff's detriment," one time prior to commencement of the trial, and the other during an overnight recess while the jury was deliberating.

Other contentions made by plaintiff are that I refused to "permit plaintiff to poll or question the jurors as to the factors influencing or shaping their responses to the Court's interrogatories." She also asserted that during the trial "it was surfaced that the presiding Judge had an association with defendant, Thomas Masterson, a former judge of the same Eastern District Court." She also avers that I "failed to conduct [myself] with impartiality during the trial" and throughout the trial I "expressed a predisposition against the plaintiff."

Plaintiff never sought to have me disqualify or recuse myself as the trial judge, before, during or subsequent to the trial. During the trial she stated no objection or claim of prejudice concerning my conduct as the trial

judge. Plaintiff refers to no specific statement, event or incident in support of her generalized contention that "throughout the trial" I expressed a "predisposition against her."

The jury selection process was routine for selecting a civil jury. Plaintiff did not object to the seating and empaneling of the jury nor to the jury selection process, nor did she at any time during the trial express any concern as to the qualification of any individual juror or of the jury as a whole. Only after the trial and a verdict adverse to her did she raise, through this motion, any concern as to the jury composition. Plaintiff was in no way precluded from asking any prospective juror any proper question. She was not precluded from challenging any juror for cause - but she made no

challenge for cause after I suggested at the conclusion of the voir dire conducted by counsel that "it would seem to me from the answers given there is probably no basis for cause for any." Tr. of Aug. 1, 1984 at 40.

Specifically, as to Mrs. Roger, defense counsel expressly suggested that Mrs. Rogers be excused as a juror, after it became known that she had been a legal secretary and worked in such capacity for me while I was a lawyer; that she knew of the firm of Morgan, Lewis & Bockius; and that she was acquainted with certain of Mr. Bechtle's partners. Perhaps typically, and possibly deliberately, in order to later claim juror prejudice if she was unsuccessful in the trial, plaintiff would not agree that Mrs. Rogers be excused. Plaintiff was in no way

precluded from asking additional questions of Mrs. Rogers. If she somehow thought that it would be harmful to do so within the hearing of the other members of the panel, she could have requested that further questioning take place at side-bar, as is done quite frequently in selecting juries for the trial of criminal cases. It is quite apparent that because the jury's verdict was unfavorable to plaintiff, she now seeks to set aside the verdict on spurious grounds that, even if they had any merit in fact, could and should have been raised during, not after, the trial so that corrective measures could have been taken if appropriate.

At a pretrial conference held the day prior to the selection of the jury, plaintiff requested that each prospective juror be sequestered and

individually questioned. Tr. of July 31, 1984, at 34.[1] I explained that this would be needlessly time consuming and that I, at least, had never done so in a civil case. I said that unless plaintiff offered some reason why there should be individually sequestered voir dire I would not grant the request. No specific reason was provided.

Trial courts possess wide discretion in the methods of conducting voir dire of prospective jurors. Federal Rule of Civil Procedure 47(a); James v. Continental Insurance Co., 424 F.2d

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1. In order to avoid disputes as to what transpired during pretrial conferences, I took the somewhat unusual precaution of having a court reporter present at most pretrial conferences so that counsel could obtain a transcript of the proceeding in the event of a dispute.

1064, 1065 (3d Cir. 1970). It is my usual practice in civil cases to permit counsel, by agreement, to question the prospective jurors in my absence. If the attorneys cannot agree as to excusing some prospective juror or an attorney wishes to challenge for cause, the attorneys take the matter up with me in chambers "on the record." Because of contentious pretrial proceedings in this case, and to satisfy myself that the examination would be conducted fairly, I decided to have the entire voir dire carried out in open court, with myself and the court reporter present. Counsel were, however, instructed and permitted to conduct the entire voir dire examination. Plaintiff's questioning of the panel of jurors consisted of sixteen pages in the record. Tr. of Aug 1, 1984 at 11-27. Questions concerning possible

bias or prejudice on account of race and sex were asked. Plaintiff was not precluded from asking any relevant questions. On one occasion I cautioned her not to make remarks or comments upon answers given by members of the panel, but simply to ask questions. It appeared to me that her comments were clearly intended to influence prospective jurors favorably to her. I also sustained an objection to the question: "Do you feel that black attorneys are less likely to win than white attorneys?" Tr. of Aug. 1, 1984 at 22-23.

Plaintiff has failed to show any prejudice by being required to question the panel as a group. No request was made to ask any particular question of a prospective juror out of the presence of the others. No response made by a

prospective juror could have prejudiced other prospective jurors. See Steinberg v. Ogden Foods, Inc., 501 F.2d 1339, 1341 (6th Cir. 1974) (no error in precluding individual voir dire). Plaintiff has not suggested in her motion a single question that she would have asked had individual voir dire been allowed that she did not ask of the group. If there was a lack of "a detailed and thorough examination" of prospective jurors, such deficiency was self-imposed by plaintiff.

The selection of Mrs. Rogers as a juror is fully set forth in the trial transcript. Plaintiff did not ask Mrs. Rogers any question concerning her employment, even thought the list provided by the clerk's office did not set forth an occupation for Mrs. Rogers. Defense counsel asked if any of

the panel members were familiar with the name of Morgan, Lewis & Bockius. Mrs. Rogers stated she was familiar with the name because she was a secretary. At that point, I called counsel to side-bar and explained that when Mrs. Rogers came in the courtroom I thought I recalled that she was a secretary for one of the judges in Bucks County. I further stated that: "I think she was a secretary for me at one time." Plaintiff asked if I was sure and I answered correctly that I was not. I then suggested to counsel:

> Ask here who she works for. But I think so. It is up to you whether you want to excuse her or not. But I believe she was the secretary for me at on time or did something--she was in the same law firm. She worked as a secretary.

Tr, of Aug. 1, 1984 at 29.

Plaintiff's counsel then asked whether

this was while I was a practicing lawyer, and I said, "Yes, when I was practicing law, 15 or 20 years ago or something like that."[2]

Mr. Bechtle then said he would probe into the matter. Mrs. Rogers stated that she had at one time worked for me; she knew of the firm of Morgan, Lewis & Bockius but she did not know how many attorneys the firm employed.

Thereafter, Mr. Bechtle identified himself as a partner in the law firm of LaBrum and Doak and asked if anyone knew the firm. Mrs. Rogers stated that her current employer (Judge Biester, Court of Common Pleas, Bucks County) used to work for the firm and that she knew

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2. It would, in any event, have been prior to December 2, 1970 when I commenced duty as a district judge.

Daniel Ryan, a current partner.

Whereupon, the following exchange transpired:

> Mr. Bechtle: Well, if I may suggest, I think in fairness, that might be a little too close for comfort. Dan Ryan is a partner of mine and also a ver good friend, and I think maybe fairness would dictate that Mrs. Rogers be excused.
>
> The Court: Well, that is a matter if counsel will agree to that. I don't know.
>
> Ms. Plummer: I have the impression that Mrs. Rogers will probably be as subjective as anyone else.
>
> Mr. Bechtle: Fine.

It is clear beyond a doubt that I brought my prior working relationship with Mrs. Rogers to counsels' attention and informed them it would be up to them whether to excuse her. After further

inquiry, Mr. Bechtle suggested that Mrs. Rogers be excused. Plaintiff, however, did not agree. Had plaintiff agreed to Mr. Bechtle's suggestion, Mrs. Rogers would have been excused. For plaintiff to now come forward with her allegations concerning Mrs. Rogers, Mr. Bechtle, and myself defies logic.

Any doubts regarding plaintiff's full knowledge of the situation and her failure to do anything at all is confirmed by yet another discussion, initiated by me at side-bar, concerning Mrs. Rogers:

> The Court: . . . .
>
> I want to say one thing about Mrs. Rogers. I think she may still be for many years a secretary for one or other of the judges, and I think she may have been a secretary for Judge Biester at one time who was at one time a partner in LaBrum & Doak.

Ms. Plummer: She certainly gets around.

Mr. Bechtle: The Congressman?

The Court: Yes, who is now a judge up there. I don't know that she worked for him, but -

Mr. Bechtle: Judge --

The Court: I don't care, but I just --

Mr. Bechtle: I am not going to ask that lady any more questions.

Ms. Plummer: No, because she probably knows you.

Mr. Bechtle: No, she doesn't. If anybody knows me, I would tell you right away.

Ms. Plummer: I don't mean that. Don't be so defensive.

The Court: Let me say this: It is my impression that she is very intelligent and would be very fair.

Ms. Plummer: I believe so.

The Court: That is entirely up to you.

Mr. Bechtle: Certainly.

Tr. of Aug. 1, 19845 at 42-43.

In light of the record, plaintiff's contentions regarding Mrs. Rogers' remaining on the jury border on the incredible. I took great care to make sure both counsel were aware of my previous employment relationship with Mrs. Rogers. Mr. Bechtle offered to have her excused and plaintiff declined. Further, despite all the knowledge plaintiff had about Mrs. Rogers, she did not use one of her peremptory challenges to strike Mrs. Rogers and of course did not seek to challenge her for cause. Once again, any perceived prejudice arising because

Mrs. Rogers was a juror was entirely self-inflicted.[3]

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3. Immediately following Mr. Bechtle's voir dire, plaintiff stated that she had three challenges for cause. I informed plaintiff that from the answers given, it seemed to me there probably was no basis to strike anyone for cause. Plaintiff's reply that "I don't want to take my chances with them and just use the peremptory challenges," is ambiguous. It could mean plaintiff either would just strike the three by using her peremptories or that she did not want to waste her peremptories to strike them. Whatever plaintiff meant does not matter. I never foreclosed plaintiff from challenging for cause and she never pursued the matter. Plaintiff never identified Mrs. Rogers or any other prospective juror as being challenged for cause. The reason I told plaintiff I did not believe there were any strikes for cause was because Mrs. Rogers had stated she could be impartial. I informed counsel several times that I would excuse her if counsel agreed. Mr. Bechtle suggested that Mrs. Rogers be stricken and plaintiff declined. Had plaintiff ever identified Mrs. Rogers as a strike for cause, she would have been excused because Mr. Bechtle had already suggested such a course of action.

Plaintiff has alleged that I "advised members of the jury that it was customary and general practice and [my] recommendation that juror #1 [Mrs. Rogers] be selected as jury foreman." Plaintiff's motion at 4. The record reveals that I charged on this matter as follows:

> The manner in which you proceed during your deliberations is a matter which is largely up to you. One of you should be appointed as the forelady or the foreman of the jury to ask [sic] [act] as your chairperson during you deliberations who will sign the Interrogatories on behalf of the jury, which are the written interrogatories which I will give to you, and who will announce your decisions on those Interrogatories by way of a special verdict when you return a verdict, if and when you return a verdict.
>
> Ordinarily, it is the number one juror who acts as the foreperson, but if among yourselves it is decided

> someone else should act in that capacity, that would be perfectly appropriate and satisfactory.

Tr. at 2112. Plaintiff's allegation that I made a "recommendation" is patently incorrect. My charge on selection of the foreperson speaks for itself. It was entirely appropriate. In no conceivable way can it be interpreted as exerting improper influence to have Mrs. Rogers selected foreperson. Many district judges select the foreperson, others designate the No. 1 juror as foreperson. The instructions that I give leave the selection entirely up to the jury.[4]

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4. Frequently the jury selects some person other than the No. 1 juror as the foreman or forelady following my instructions.

That Mrs. Rogers was seated as a juror was entirely of plaintiff's own choosing because she expressly declined Mr. Bechtle's offer that Mrs. Rogers be excused. That Mrs. Rogers was seated as No. 1 juror was purely fortuitous; her selection as the forelady was that of the jury. Again, of course, plaintiff took no exception to that portion of the charge, and raised no objection to the proposed procedure for selecting the foreperson. An opportunity to do so was provided as required by Federal Rule of Civil Procedure 51.

Plaintiff contends that "on at least two occasions" Mrs. Rogers "participated in communications to plaintiff's detriment." Plaintiff's motion at 4. She alleges that one occasion was prior to the start of the trial, and the other during the evening when the jury

recessed while in deliberation. Plaintiff does not specify in any way with whom such communications took place, the nature or substance of the communications, how, or in what way, they prejudiced plaintiff, or when and from what sources plaintiff obtained the information. I assume plaintiff is aware of Federal Rule of Civil Procedure 11, but plaintiff's totally unsupported general allegations provide no basis for granting any of the relief which plaintiff requests. If plaintiff had any facts at all for her assertions, she most certainly would have set them forth in the motion.

The morning following the jury's recess, as is my usual custom, I specifically questioned the jurors concerning whether anyone had discussed the case with any of them during the

recess. All answered in the negative and I then told them to proceed with their deliberations. Plaintiff raised no objection to the recess, nor did she request that I question the jurors further.

Plaintiff contends that I refused to "permit plaintiff to poll or question the jurors as to the factors influencing or shaping their responses to the Court's interrogatories." Id. This contention is totally without merit for several reasons. First, plaintiff made any such request. After the announcement of the jury verdict, the following occurred:

> The Court: . . . .
>
> Is there any question as to the form of the answers to the Interrogatories?
>
> Mr. Bechtle: No, sir.

> The Court: All right, then, there is no request the jury be polled.

Tr. at 2182. Because plaintiff did not request, as is her right, that the jury be polled, I undertook, on my own, to ask the jury if their decision was unanimous and that the jury understood that they were in effect finding for defendants on all issues. At that point plaintiff stated, "Your Honor, I would like a polling of the jury." Id. Whereupon, each juror was asked, without the interrogatory being read, how he or she answered each question. The polling that took place was entirely appropriate under the law and plaintiff never objected or requested anything further.

The other problem with plaintiff's contention is that the inquiry she allegedly requested is expressly forbidden by the rules of evidence. The Federal Rules of Evidence expressly provide that:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

Fed. R. Evid. 606(b). Plaintiff's motion states that I refused to allow her "to poll or question the jurors as

to the factors influencing or shaping their responses to the Court's interrogatories." Plaintiff's motion at 4. Even had plaintiff made such a request, it would have been denied as exactly the type of inquiry precluded by Federal Rule of Evidence 606(b).

Plaintiff contends that during the trial it was discovered (plaintiff's terminology was "it was surfaced") that I had an "association" with defendant, Thomas Masterson, a former judge of this district who testified at trial. Thomas A. Masterson was appointed a judge in this district in 1967 and sat as a district judge until November 1, 1973, when he resigned his position and returned to private practice with MLB. I joined this district as a judge on December 2, 1970. Thomas Masterson and I were therefore colleagues for about

three years. The extent of our "association" was serving contemporaneously as federal judges in this district. Such an "association" in no way affected the trial of plaintiff's case. Plaintiff fails to identify any prejudice that was caused her by this "association." Further, it is and was a matter of public record that Thomas Masterson and I were judges at the same time in this district. I cannot believe plaintiff was not aware of this fact prior to trial. Plaintiff, herself, throughout the trial referred to Mr. Masterson as "Judge Masterson." In an event, plaintiff at no time before or during the trial, when the testimony was elicited, asked for me to recuse myself or asked for a mistrial or any instruction to the jury or any other

form of relief. Plaintiff's contention is both untimely and lacking in substantive merit. It is purely and plainly another attempt to "grasp at straws," in a desperate attempt to obtain relief to which she is not entitled.

"One final note needs to be addressed regarding this contention. When this case was filed, it was originally assigned, under our random assignment system, to then Chief Judge Joseph S. Lord. Judge Lord sent a memorandum, dated September 30, 1980, to the Clerk of Court, stating that he had recused himself because of his "close personal relationship with Judge Masterson" who was named as a defendant. See Memorandum attached to Docket Entry No. 3. The case was

thereupon reassigned to me. Copies of the reassignment order were mailed to counsel although a copy of Judge Lord's memorandum was not. It is clear, however, that this court was aware of the potential problem involving Mr. Masterson. I accepted assignment of this case because, although I was a colleague, our prior professional relationship in no way affected my ability to sit as a judge in this matter." It in no way affected any ruling or decision made by me in this case.

Plaintiff alleges that the selection process used for the jury was not random and "did not permit the selection of a jury which was reflective of the racial balance of the prospective jury panel." Plaintiff's motion at 3. In order to

fully understand plaintiff's claim an explanation of the jury selection process is in order.

In this district a civil litigant is entitled to an right-member jury. E.D. Pa. R. Civ. P. 34(b)(1). In addition, each side is entitled to three peremptory challenges. 28 U.S.C. §1870. Thus, in order to select an eight-member jury, a minimum of fourteen potential jurors is needed. Because of the possibility of strikes for cause, 28 U.S.C. §1870, usually more than fourteen prospective jurors are called. In this case, out of an abundance of caution, I had twenty-four prospective jurors randomly selected by the clerk, and seated in the order of selection in the courtroom. Following voir dire, it was apparent that, based upon the responses

given, there were no prospective jurors who should be stricken for cause. I told counsel so and neither identified any specific juror challenged for cause. Tr. of Aug. 1, 1984 at 40. I, therefore, explained to counsel that following the usual procedure, the prospective jurors on the list who were given numbers fifteen through twenty-four would be stricken. Id. at 40-41.

Plaintiff thereupon expressed concern with my procedure. Plaintiff's concern was that of the twenty-four prospective jurors brought in, seven were black, but only two of the seven were among the first fourteen. Plaintiff apologized for her lack of experience in selecting a jury and wanted to know if there was some other

way to select the fourteen prospective jurors from which the eight-member jury would be selected. Id. I told plaintiff this was the way it was always done and that I knew of no other adequate procedure. Id. at 40. She made no suggestion as to any other possible procedure.[5]

Plaintiff's claim that the jury was not selected randomly is incorrect. When my deputy clerk called the jury selection room and requested a panel of

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5. Interestingly, had plaintiff agreed to Mr. Bechtle's suggestion that Mrs. Rogers be excused, the likelihood of seating a black person on the jury would have been increased. Also, had there been individual sequestered voir dire of the prospective jurors, absent any excuse or challenge for cause, the jury would have been selected from the same fourteen members of the panel, and the balance of the panel containing some black persons would not even have been summoned for the voir dire.

twenty-four jurors, twenty-four names were drawn randomly from the overall panel serving at the time. The names were drawn one at a time and as they were selected the names were listed in the order drawn. I do not know how many blacks were in the overall jury pool. Plaintiff has not challenged that selection process. I do know, however, that there were seven blacks included in the panel of twenty-four brought up to my courtroom. Where any one potential juror's name appeared in order on the list of twenty-four was purely fortuitous, for they had been selected at random. I asked for twenty-four prospective jurors instead of just the fourteen needed because of possible challenges for cause. Because there were no strikes for cause only the first fourteen potential jurors were needed.

The other ten were therefore stricken.[6]

Plaintiff's final contention is that I "failed to conduct [myself] with impartiality during the trial" and throughout the trial I "expressed a predisposition against the plaintiff." Plaintiff refers to no specific instance or example of such conduct or predisposition. I find it personally embarrassing to rule upon such a contention. I am convinced that a careful review of the entire record will disclose that every attempt was made to

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6. Plaintiff's contention that the jury was not reflective of the racial balance of the jury panel is not persuasive. It is well settled that "the panel and the array are not suspect because of the absence of a member of the litigant's group from the trial jury." Padgett v. Buxton-Smith Mercantile Co., 283 F.2d 597, 600 (10th Cir. 1960), cert. denied, 365 U.S. 828 (1961).

be scrupulously fair and impartial. My only concern was that the litigants have the case presented to the jury without trial error; the outcome was of no concern to me.

At least as to close evidentiary rulings, it there was any "predisposition," it may have been to favor the plaintiff. For example, defendants sought to introduce a videotape deposition of retired MLB partner Benjamin Quigg, who was in Europe at the time of trial. Plaintiff had refused or neglected to attend the deposition. Federal Rule of Civil Procedure 32(a)(3) and Local Rule 21(d)4(e) lend strong support to the videotape deposition's admissibility. Nevertheless, out of an overabundance of caution, I sustained plaintiff's objection and excluded the videotape.

As in all trials, I made a number of evidentiary rulings when counsel made objections. Undoubtedly, some of the rulings were unfavorable to plaintiff as well as to defendants. Whatever rulings were made, they were made to the best of my ability by correctly applying the rules of evidence regardless of the consequence. Plaintiff, who in her testimony described herself as an "aggressive person," seems unable to comprehend that an adverse evidentiary ruling does not mean that the trial judge is prejudiced against her.

In conclusion, plaintiff's allegations in support of her motion for a "mistrial" taken individually and collectively fail to provide any basis for relief from the verdict. Plaintiff received a full and fair trial on the merits. The jury's findings are amply

supported by the record. A review of the record shows that plaintiff's contentions are totally invalid and without merit.

Plaintiff's motion will be denied in its entirety.

IN THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

ROSALIND M. PLUMMER, ESQUIRE	:	CIVIL ACTION
v.	:	
GEORGE AMAN, III, et al.	:	NO. 80- 3676

ORDER

Upon consideration of the pleading filed by plaintiff, entitled "Plaintiff's Motion For Mistrial and To Show Cause Why Said Motion Should Not Be Granted," together with briefs filed by counsel, for the reasons set forth in the accompanying memorandum, it is

Ordered that plaintiff's motion is denied and dismissed, and it is further ordered that any and all relief sought by the plaintiff is denied.

BY THE COURT:

Donald W. VanArtsdalen, J.

October 18, 1984

APPENDIX G

District Court Discovery Memorandum and Order of March 20, 1984.
(Entered 3/21/84)

IN THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

ROSALIND M. PLUMMER, ESQUIRE	:	CIVIL ACTION
	:	ENTERED 3/21/84
v.	:	
	:	
GEORGE AMAN, III, et al.	:	NO. 80-3676

MEMORANDUM AND ORDER

VanARTSDALEN, J. March 20, 1984

Plaintiff, a black female lawyer, formerly an associate in the law firm of Morgan, Lewis and Bockius, filed an action alleging racial and sexual employment discrimination by Morgan, Lewis and Bockius. The claims are made under Title VII of the Civil Rights Act of 1964, Sections 1981 and 1985 of the Civil Rights Act of 1871, and the Equal Pay Act of 1963. A jury trial has been demanded. Money damages only are sought.

The trial of this case has been long delayed due primarily to discovery disputes that were further complicated by the withdrawal of plaintiff's retained counsel in July of 1983. Plaintiff has, since July of 1983, been representing herself.

A conference was held in chambers on December 23, 1981, to establish the scope of discovery. The conference was called because of a disputed motion to compel answers to interrogatories. At that conference, I made oral rulings as to the limits of discovery that were to control pretrial preparation. No written order was signed as to the specific matters, but was memorialized between counsel in several later communications. In any event, those rulings which were implemented and remain in effect are the following:

1. Discovery would be limited to a period commencing September, 1975 and ending December 31, 1979 (Plaintiff was employed in September 1978 and resigned in September or October, 1979).

2. Discovery as to hiring and recruiting practices of the defendant would be precluded, because plaintiff had been recruited and hired and the complaint contained no valid claim of discrimination in hiring and/or recruiting of plaintiff.

3. Discovery as to employees of Morgan, Lewis and Bockius would be limited to attorney-associates and paralegals. Plaintiff's sole

position with defendants was as an attorney-associate.

4. Defendants were to respond to relevant discovery, where sought, as to all offices of Morgan, Lewis and Bockius that were in the United States. Plaintiff's sole place of employment was in the Philadelphia office.

5. Defendants were to respond to relevant discovery, where sought, as to Hispanic-surnamed and other recognized minorities. Plaintiff is a black female.

6. Defendants were required to answer Interrogatories 7(d) and 7(e) concerning contracts between Morgan, Lewis and Bockius and the Government.

Defendants were not required to provide specific information or copies or produce originals of certain forms identified as EEO-1 reports.

Thereafter, supplemental answers were filed by defendants, and plaintiff's counsel filed requests for production of documents and admissions which were responded to by defendants insofar as defendants deemed they were required to so do under the rulings of December 23, 1981.

There have been several conferences concerning discovery disputes and scheduling problems. Both parties have on occasion filed motions to compel, and I have entered written orders on November 17, 1983 and January 9, 1984.

On November 23, 1983, pursuant to the order of November 17, 1983, plaintiff, by letter, requested additional information, much of which sought discovery beyond that limited by the rulings of December 23, 1981. In addition, plaintiff filed an entirely new set of supplemental interrogatories and requests for production of documents, which were not intended to be permitted under the order of November 27, 1983. Defendants responded to the letter request, disputing plaintiff's entitlement to much of that requested. On January 27, 1984, plaintiff filed the present motion to compel full compliance with all of her requests of November 23, 1983. Defendants have filed a reply.

Plaintiff continues to seek discovery as to matters prior to 1975.

Considering that she was employed in September 1978, and has alleged certain specific acts of discrimination, the time period commencing in 1975 is more than adequate. Defendants were required and have supplied certain information not only as to attorney-associates, but also paralegals, although employment practices as to paralegals is probably irrelevant. Likewise, hiring and/or recruiting is not an issue in this case.

A review of the long running disputes over discovery in this case convinces me that both plaintiff and defendants have received more than adequate information from the opposing party to fully and properly prepare and present this case for trial.

Plaintiff, in her letter of November 23, 1983, asked to take the

oral deposition of fourteen members of the defendant law firm. Because of the ongoing disputes, apparently no deposition other than the deposition of Howard Shecter, Esq., has been taken. At earlier stages of this proceeding requests had been made to take the depositions of Messrs. Masterson, Brenan, Lewis, Kittredge, Taylor, Quigg and Littleton. At oral hearing held on January 6, 1984, I opined that plaintiff should be entitled to depose any partner who might possess relevant information. It is disputed whether certain of the individuals whose depositions are requested ever had any contact with or were in any way involved in the evaluative process of plaintiff. Plaintiff will be permitted to depose all of the partners whom she sought to depose in the letter request of

November 23, 1983, provided such persons remain partners in the firm, and the depositions are promptly scheduled.

IN THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

ROSALIND M. PLUMMER, ESQUIRE	:	CIVIL ACTION
v.	:	
GEORGE AMAN, III, et al.	:	NO. 80-3676

ORDER

It is ordered that plaintiff's motion, filed January 27, 1984, to compel the defendants to answer interrogatories and produce documents (in which plaintiff seeks an order directing defendants to answer plaintiff's discovery requests set forth in the letter request of November 23, 1983, and plaintiff's supplemental requests filed November 23, 1983) is denied and dismissed; except, however, plaintiff shall have the right to take the depositions promptly, at a mutually arranged time and place, of Thomas

Masterson, John Lewis, Denis Brenan, Timothy Kittredge, William Taylor, Robert H. Young, Benjamin Quigg, George Aman, Arthur Littleton, Joseph Torregrossa, James Jennings, Harry Reagan, Alan Reed, David O'Brien, provided said individuals are presently members of the law firm of Morgan, Lewis and Bockius. These depositions shall not entitle plaintiff to obtain production of any records not heretofore provided to plaintiff through discovery.

BY THE COURT:

Donald W. VanArtsdalen, J.

March 20, 1984.
Entered March 21, 1984

Supreme Court, U.S.
FILED
DEC 16 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-809

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

ROSALIND M. PLUMMER, ESQUIRE,
Petitioner

v.

GEORGE AMAN, III, et al.,
Respondents

On Petition For a Writ of Certiorari To the United States Court of Appeals For the Third Circuit

BRIEF OF RESPONDENTS, GEORGE AMAN, III, et al., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING IN THE COURT BELOW

Petitioner, Rosalind M. Plummer, a black female attorney, was the appellant in the court below. Respondents, George Aman, III, *et al.*, certain present and former partners of the law firm of Morgan, Lewis & Bockius, were the appellees in the court below.

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BRIEF OF RESPONDENTS, GEORGE AMAN, III, ET AL., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The Respondents, George Aman, III, et al., respectfully request that this Court deny the Petition for A Writ of Certiorari seeking review of the decision of the Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Memorandum Opinion of the United States Court of Appeals for the Third Circuit is set forth in Petitioner's Appendix A. The court below directed that its Memorandum Opinion not be published.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1).

COUNTER-STATEMENT OF THE CASE

On September 22, 1980, Petitioner, Rosalind M. Plummer ("Petitioner" or "Plummer"), a black female lawyer, commenced an action against certain present and former partners of the law firm of Morgan, Lewis & Bockius ("Morgan"), alleging racial and sexual discrimination in connection with her employment as an associate attorney of Morgan. Petitioner was hired by Morgan as an attorney upon her graduation from law school in 1978 and continued in that employment for approximately one year before she resigned in September 1979.

In her Complaint Petitioner alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e - 2000e-17; the Civil Rights Acts of 1866 and 1870, 42 U.S.C. §1981; the Civil Rights Acts of 1861 and 1871, 42 U.S.C. §1985; and the Equal Pay Act, 29 U.S.C. §206(d). Petitioner was originally represented by counsel in the district court. However, on June 22, 1983, almost three years after the commencement of Petitioner's action, she discharged her attorney, and elected to proceed as her own attorney.

After four years of pre-trial discovery, Petitioner's action was tried in August, 1984. Petitioner's claims under 42 U.S.C. §§1981 and 1985, and the Equal Pay Act, 29 U.S.C. §206(d), were tried to a jury; her claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e - 2000e-17, was tried to the court with the jury serving as an advisory jury with respect to that claim. After a trial which lasted almost two weeks, in which Petitioner presented thirteen witnesses, the case was

submitted to the jury on August 15, 1984. The jury returned its verdict by answering written interrogatories on August 16, 1984.

The jury found that Morgan had not discriminated against Petitioner because of her race or sex with respect to her compensation, terms, conditions or privileges of employment. The jury found, further, that there had been no conspiracy among partners of the Firm to deprive Petitioner of equal rights because of her race, and that Morgan had not discriminated against Plummer with respect to wages. Finally, the jury concluded that Morgan had constructively discharged Plummer but specifically found that such discharge was not by reason of her race or sex. Based on the jury's answers to the written interrogatories, the court entered judgment in favor of all Respondents on August 20, 1984, with respect to all claims that were tried to the jury.

Subsequent to the entry of judgment, Petitioner filed a pleading entitled "Plaintiff's Motion for Mistrial and To Show Cause Why Said Motion Should Not be Granted." The court below treated Petitioner's motion as a motion for a new trial under Fed. R. Civ. P. 59. Petitioner's motion was denied by the court in a thorough Opinion dated October 18, 1984 (Appendix F).

On October 16, 1984, the district court entered an Opinion, Findings of Fact, Conclusions of Law, and Order with respect to Petitioner's Title VII claim, which was tried to the court. The court found that Respondents had not discriminated against Petitioner on the basis of her race or sex, with respect to compensation, or any term, condition or privilege of employment. Accordingly, the court entered judgment in favor of Respondents on all claims asserted by Petitioner under Title VII (Appendix C(1)).

Despite the fact that she had failed to submit proposed findings of fact and conclusions of law to the trial judge, Petitioner subsequently filed a motion to amend the court's findings of fact and conclusions of law. In a Memorandum Opinion and Order which was entered on December 3, 1984, the court denied Petitioner's motion.

Petitioner then appealed to the United States Court of Appeals for the Third Circuit. In a Memorandum Opinion dated August 14, 1985, the court below affirmed the entry of judgment against Petitioner (Appendix A). After reviewing the procedural history of this case in great detail, the court rejected all of Petitioner's claims on appeal, stating that it was "convinced that there is no merit in any of the claims raised in [Petitioner's] motion for a new trial." (Appendix A at 12). The court below found, further, that "[w]ith respect to [Petitioner's] claim that the trial judge otherwise exhibited a bias against [Petitioner] throughout the trial, we are satisfied after a review of the record that the trial judge conducted a fair and impartial trial. The portions of the record cited by [Petitioner] simply do not support her claim of bias." (Appendix A at 15). Petitioner has now filed a Petition for a Writ of Certiorari, seeking review by this Court.

COUNTER-STATEMENT OF THE FACTS

Petitioner primarily attacks the integrity and conduct of the trial judge. Despite four years of discovery, and Petitioner's presentation of thirteen witnesses during a trial which lasted almost two weeks, she asserts, without any foundation whatsoever, that she was denied a fair trial. Respondents respond below to each of the main thrusts of Petitioner's factual statement.

1. The Selection of Anna Rogers As A Member Of The Jury And As Foreperson

Petitioner alleges that the trial judge abused his discretion in failing to remove, *sua sponte*, Ms. Anna Rogers as a member of the jury. The facts with respect to the selection of Ms. Rogers as a jury member were addressed at length by the trial judge in his Opinion denying Petitioner's "Motion for Mistrial" and by the Third Circuit in its Memorandum Opinion, and are summarized briefly herein.

In response to questioning by Respondents' counsel on *voir dire*, Ms. Rogers stated that she was familiar with the name of Morgan, Lewis & Bockius. The trial judge then requested to see counsel at sidebar, where he advised Petitioner and counsel for Respondents that he believed Ms. Rogers was his secretary at one time, before he became a judge. The trial judge also advised the parties that "[i]t is up to you whether you want to excuse her or not."

Following this sidebar discussion, in response to further questioning by Respondents' counsel, Ms. Rogers stated that she used to work for the trial judge but that her possible involvement in this matter did not make her uncomfortable. Ms. Rogers also stated that her present employer was a former partner of the law firm representing Respondents and that she was familiar with another partner in that firm. At that point Respondents' counsel suggested that perhaps "fairness would dictate that Mrs. Rogers be excused." The trial judge advised that he would excuse Ms. Rogers "if counsel will agree to that." Petitioner rejected that suggestion, stating, "I have the impression that Mrs. Rogers will probably be as subjective [sic?] as anyone else."

Following the *voir dire* of the jury panel members, the trial judge again discussed Ms. Rogers with the parties at sidebar. During that discussion the trial judge opined that Ms. Rogers "would be very fair." After Petitioner agreed with the judge's assessment, the judge again advised the parties that the question of Ms. Rogers' selection as a juror was "entirely up to you."

The parties then proceeded to exercise their peremptory challenges. Petitioner did not use one of her challenges to strike Ms. Rogers from the panel. Moreover, at no time did Petitioner seek to challenge Ms. Rogers for cause. On the contrary, as is evident from the record, Petitioner stated that she believed that Ms. Rogers would be a fair juror. Even upon the offer by Respondents' counsel and the suggestion of the trial judge, Petitioner declined to agree to having Ms. Rogers excused.

Petitioner also asserts that the trial judge improperly influenced the jury in the selection of Ms. Rogers as foreperson, asserting that the trial judge engaged in "lobbying to secure the selection of Ms. Rogers as jury foreperson." (Petition at 39). This allegation was addressed fully by the trial judge and the court below. The record reveals that the trial judge charged the jury as follows with respect to the selection of a foreperson:

> The manner in which you proceed during your deliberations is a matter which is largely up to you. One of you should be appointed to act as the forelady or the foreman of the jury to [act] as your chairperson during your deliberations . . . ."
>
> Ordinarily, it is the number one juror who acts as the foreperson, but if among yourselves it is decided someone else should act in that capacity, that would be perfectly appropriate and satisfactory.

Petitioner did not object to the foregoing portion of the trial judge's charge regarding the selection of a foreperson, although she had the opportunity to do so. Ms. Rogers, who was the number one juror, was selected by the jury as foreperson during its deliberations.

2. The Trial Judge's Handling Of Pre-trial Discovery Matters

Before this case was tried in August, 1984, the parties engaged in four years of pre-trial discovery. On December 23, 1981, at a conference held in chambers, the district court made certain rulings as to the appropriate scope of discovery. In a Memorandum and Order dated March 20, 1984, the district court summarized its prior rulings as follows:

> 1. Discovery would be limited to a period commencing September, 1975 and ending December 31, 1979 (Plaintiff was employed in September 1978 and resigned in September or October, 1979).
>
> 2. Discovery as to hiring and recruiting practices of the defendant would be precluded, because plaintiff had been recruited and hired and the Complaint contained no valid claim of discrimination in hiring and/or recruiting of plaintiff.
>
> 3. Discovery as to employees of Morgan, Lewis & Bockius would be limited to attorney-associates and paralegals. Plaintiff's sole position with defendants was as an attorney-associate.
>
> 4. Defendants were to respond to relevant discovery, where sought, as to all offices of Morgan, Lewis & Bockius that were in the United States. Plaintiff's sole place of employment was in the Philadelphia office.

5. Defendants were to respond to relevant discovery, where sought, as to Hispanic-surnamed and other recognized minorities. Plaintiff is a black female.

6. Defendants were required to answer Interrogatory 7(d) and 7(e) concerning contracts between Morgan, Lewis & Bockius and the Government. Defendants were not required to provide specific information or copies or produce originals of certain forms identified as EEO-1 reports.

Appendix G

Commencing shortly after the court's original ruling on the scope of discovery, Respondents made available to Petitioner the requested information concerning the name, race, sex and employment history of all associates and paralegals who were employed by Morgan between 1975 and 1979. In addition, Respondents produced at Petitioner's request the personnel and/or evaluation files of numerous individuals who had been employed as associates during the relevant time frame. The court also granted Petitioner's request, after the close of discovery, that she be permitted to take the depositions of fourteen Morgan partners who either worked with Petitioner or participated in decisions regarding her employment. Despite this opportunity, Petitioner chose not to take any of those depositions and, in fact, took only one deposition during the entire litigation. That deposition was of Howard L. Shecter, Morgan's managing partner during Petitioner's tenure.

Despite the district court's clear guidelines concerning the scope of discovery, and Respondents' complete compliance with all discovery requests which fell within these guidelines, Petitioner continued to seek discovery concerning matters previously excluded by the trial

judge. In March 1984, the trial judge denied Petitioner's motion to compel discovery relating to matters which took place prior to 1975. The court concluded at that time:

> A review of the long running disputes over discovery in this case convi[illegible]es me that both plaintiff and defendants have received more than adequate information from the opposing party to fully and properly prepare and present this case for trial.

Appendix G

The court below affirmed the district court's exercise of its discretion with regard to discovery matters.

SUMMARY OF REASONS FOR DENYING THE WRIT

The opinion of the court below, which affirmed the district court's entry of judgment in favor of Respondents, was based upon sound legal principles as to which there is no conflict among the circuit courts or with any decision of this Court. The procedures followed by the district court, which were affirmed by the court below, were consistent with the accepted and usual course of judicial proceedings and do not necessitate an exercise of this Court's power of supervision. Petitioner's disagreement with the decision of the court below lies not with the legal principles articulated by the court but with the factual findings to which those principles were applied. The decision is of importance solely to the litigants to this case and turns on facts unique to this case. Thus, there are no important or compelling reasons for granting the petition.

ARGUMENT

The Petition Should Be Denied For The Reason That The Procedures Followed By The District Court, And Affirmed By The Court Below, Were Consistent With The Accepted and Usual Course Of Judicial Proceedings.

Petitioner does not seek to invoke this Court's jurisdiction on the basis of any conflict among the circuit courts nor does she assert that the legal principles articulated by the court below are in conflict with any decisions of this Court. Instead, Petitioner asserts that the procedures followed by the district court, which were unanimously affirmed by the court below, were such a departure from the accepted and usual course of judicial proceedings as to require the extraordinary exercise of this Court's supervisory powers. It is clear, however, from the opinions of the district court and the court below that the conduct of the district court was scrupulously fair and impartial, and that Petitioner received a full and fair trial upon the merits.

Much of Petitioner's argument is devoted to the selection of Anna Rogers as a member of the jury. Petitioner argues that the district court acted improperly in failing to remove Ms. Rogers from the jury *sua sponte*. A review of the district court's opinion clearly reveals that the trial judge properly exercised his discretion in failing to do so in light of Petitioner's affirmative statements indicating that she was satisified with selecting Ms. Rogers as a juror.

In its opinion denying Petitioner's motion for mistrial, the district court reviewed thoroughly the facts surrounding the selection of Ms. Rogers as a member of the jury:

Specifically, as to Mrs. Roger[s], defense counsel expressly suggested that Mrs. Rogers be excused as a juror, after it became known that she had been a legal secretary and worked in such capacity for me while I was a lawyer; that she knew of the firm of Morgan, Lewis & Bockius; and that she was acquainted with certain of Mr. Bechtle's partners. *Perhaps typically, and possibly deliberately, in order to later claim juror prejudice if she was unsuccessful in the trial, plaintiff would not agree that Mrs. Rogers be excused.* . . . It is quite apparent that because the jury's verdict was unfavorable to plaintiff, she now seeks to set aside the verdict on spurious grounds that, even if they had any merit in fact, could and should have been raised during, not after, the trial so that corrective measures could have been taken if appropriate.

* * *

The selection of Mrs. Rogers as a juror is fully set forth in the trial transcript. Plaintiff did not ask Mrs. Rogers any question concerning her employment, even though the list provided by the clerk's office did not set forth an occupation for Mrs. Rogers. Defense counsel asked if any of the panel members were familiar with the name of Morgan, Lewis & Bockius. Mrs. Rogers stated she was familiar with the name because she was a secretary. At that point, I called counsel to side-bar and explained that when Mrs. Rogers came in the courtroom I thought I recalled that she was a secretary for one of the judges in Bucks County. I further stated that: 'I think she was a secretary for me at one time.' Plaintiff asked if I was sure and I answered correctly that I was not. I then suggested to counsel: 'Ask her who she works for. But I think so. *It is up to you whether you want to*

excuse her or not. But I believe she was the secretary for me at one time or did something—she was in the same law firm. She worked as a secretary.'

Tr. of Aug. 1, 1984 at 29.

Plaintiff's counsel then asked whether this was while I was a practicing lawyer, and I said, 'Yes, when I was practicing law, 15 or 20 years ago or something like that.'

* * *

It is clear beyond a doubt that I brought my prior working relationship with Mrs. Rogers to counsels' attention and informed them it would be up to them whether to excuse her. After further inquiry, Mr. Bechtle suggested that Mrs. Rogers be excused. Plaintiff, however, did not agree. *Had plaintiff agreed to Mr. Bechtle's suggestion, Mrs. Rogers would have been excused.* For plaintiff to now come forward with her allegations concerning Mrs. Rogers, Mr. Bechtle, and myself defies logic.

* * *

In light of the record, plaintiff's contentions regarding Mrs. Rogers' remaining on the jury border on the incredible. I took great care to make sure both counsel were aware of my previous employment relationship with Mrs. Rogers. *Mr. Bechtle offered to have her excused and plaintiff declined.* Further, despite all the knowledge plaintiff had about Mrs. Rogers, she did not use one of her peremptory challenges to challenge Mrs. Rogers and of course did not seek to challenge her for cause. Once again, any perceived prejudice arising because Mrs. Rogers was a juror was entirely self-inflicted.

Appendix F at 11-23 (emphasis added) (footnotes omitted).

It is well settled that the decision whether to seat or excuse jurors is committed to the discretion of the trial court, and that such decisions will be reversed "only if there is a manifest abuse of such discretion." *Vanskike v. ACF Industries*, 665 F.2d 188, 207 (8th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982); *Kinty v. United Mine Workers of America*, 544 F.2d 706 (4th Cir. 1976), *cert. denied*, 429 U.S. 1093 (1977); *Anderson v. Dun & Bradstreet*, 543 F.2d 732 (10th Cir. 1976); *Cox v. General Electric Co.*, 302 F.2d 389 (6th Cir. 1962). Moreover, a party cannot complain of errors "which it has committed, invited, induced the court to make, or to which it consented." *Weise v. United States*, 724 F.2d 587, 590-91 (7th Cir. 1984). The record is clear that Petitioner consented to Mrs. Rogers' selection and expressed her confidence in Mrs. Rogers' ability to be a fair juror. The trial judge advised the parties that, if they agreed, he would excuse Mrs. Rogers. Counsel for Respondents offered to excuse Mrs. Rogers; however, Petitioner rejected that offer. It is simply ludicrous for Petitioner now to suggest that the trial judge acted improperly in failing to remove Mrs. Rogers from the jury *sua sponte*, and that the court below committed error in sanctioning the trial judge's actions. As the court below concluded, "[h]aving thus expressly approved Ms. Rogers as a juror, [Petitioner] cannot now complain about her presence on the jury." (Appendix A at 13).

Equally without merit are Petitioner's other contentions regarding the jury selection process. Prior to the trial, Petitioner requested that each potential juror be sequestered and individually questioned. The trial judge denied this request on the grounds that this procedure would be needlessly time consuming and highly unusual in a civil case. During *voir dire* Petitioner was not precluded from asking any relevant questions. On the contrary, Petitioner was given a full opportunity to question the prospective jurors regarding any possible bias or

prejudice on account of race or sex. As the district court correctly found, Petitioner failed to show any prejudice by being required to question the panel as a group, rather than individually. Fed. R. Civ. P. 47(a) "confers upon the trial judge broad discretion as to the manner in which *voir dire* is conducted and the type and scope of the questions to be asked." *James v. Continental Insurance Co.*, 424 F.2d 1064, 1065 (3d Cir. 1970). The district court's conduct of the *voir dire* was in conformity with the accepted and usual course of judicial proceedings and thus need not be reviewed by this Court.

Petitioner's assertion that she was denied a fair trial because the jury did not include any blacks is without merit. As the trial judge explained in his Opinion denying Petitioner's Motion for Mistrial, the process used for selecting the jury was entirely random, and the placement of prospective jurors in the jury pool was "purely fortuitous." (*See* Appendix F at 34-39).

Petitioner's assertion that the trial judge lobbied to have Mrs. Rogers selected as jury foreperson is frivolous. The record reveals that, contrary to Petitioner's assertion, the trial judge did not instruct the jury that Mrs. Rogers should be selected as foreperson:

> Ordinarily, it is the number one juror who acts as a foreperson, but if among yourselves it is decided someone else should act in that capacity, that would be perfectly appropriate and satisfactory.

The court below found that the district court's comments "speak for themselves." (Appendix A at 14). Petitioner raised no objection to the district court's charge regarding the selection of a foreperson and thus waived her right to assign error to the court's instructions. *See e.g., Holloway v. J.B. Systems, Ltd.*, 609 F.2d 1069 (3d

Cir. 1979) (*per curiam*); *Schwartz v. American Honda Motor Co., Inc.*, 710 F.2d 378 (7th Cir. 1983).

There is also no basis for Petitioner's assertion that this Court must exercise its supervisory powers to review the district court's conduct of discovery. It is well settled that "the conduct of discovery is . . . committed to the discretion of the district court" and that "[t]he substantial discretion granted the trial courts on discovery motions should not be lightly disturbed, even if the reviewing court's notions of fairness would have led it to a different result." *Stich v. United States*, 730 F.2d 115, 117-18 (3d Cir.), *cert. denied*, 105 S. Ct. 294 (1984).

In the instant case, the trial judge's rulings with respect to discovery were consistent with the sound exercise of discretion. Despite the fact that Petitioner was employed solely as an attorney in Morgan's Philadelphia office between September 1978 and September 1979, the district court permitted the Petitioner to take discovery with respect to all attorney-associates and paralegals employed in any of Morgan's United States offices between September 1975 and December 31, 1979. In accordance with the Court's rulings, Respondents made available to Petitioner the name, race, sex and employment history of all such associates and paralegals who were employed by Morgan between 1975 and 1979. Petitioner also requested and was given a copy of the personnel and/or evaluation files of thirty-five associates who were employed during that time frame, including the files of all minority associates who were employed during that period.

Thus, Petitioner's assertion that the trial judge's rulings concerning the scope of discovery precluded her from obtaining evidence regarding Morgan's treatment of other black or female associates is simply contrary to the facts. At the conclusion of the discovery period, the

district court judge denied Petitioner's motion to compel additional discovery stating:

> A review of the long running disputes over discovery in this case convinces me that both plaintiff and defendants have received more than adequate information from the opposing party to fully and properly prepare and present this case for trial.

The district court's conduct of discovery in this case was fully consistent with the sound exercise of discretion and need not be reviewed by this Court.

Finally, Petitioner makes the unfounded assertion that the trial judge's conduct at trial exhibited bias and prejudice. The court below considered Petitioner's assertion and concluded, "we are satisfied after a review of the record that the trial judge conducted a fair and impartial trial. The portions of the record cited by [Petitioner] simply do not support her claim of bias." (Appendix A at 15).

In denying Petitioner's Motion for Mistrial, the district court judge concluded:

> As in all trials, I made a number of evidentiary rulings when counsel made objections. Undoubtedly, some of the rulings were unfavorable to plaintiff as well as to defendants. Whatever rulings were made, they were made to the best of my ability by correctly applying the rules of evidence regardless of the consequences. Plaintiff, who in her testimony described herself as an 'aggressive person,' seems unable to comprehend that an adverse evidentiary ruling does not mean that the trial judge is prejudiced against her.

Appendix F at 41.

There is absolutely no basis for Petitioner's allegations regarding the integrity and conduct of the trial judge. As the court below concluded, a review of the record discloses that Petitioner received a full and fair trial on the merits.

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that there are no special or important reasons favoring the exercise of this Court's discretionary power of review. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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